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ABSTRACT

Complete information about the Michigan Teachers' Tenure Act is presented in this 12-chapter volume. Tenure is an employment security device giving permanent status and protection against dismissal except for stated cause. An overview discusses tenure's advantages and disadvantages and legislation in Michigan that culminated in the 1964 Teachers' Tenure Act. Chapter 2 covers certification in relation to tenure rights. The probationary period and dismissal are analyzed in chapter 3. Tenure rights for nonclassroom positions are dealt with in chapter 4. In a discussion of layoff and recall, chapter 5 describes the local controlling boards' authority, notice requirements, and recall obligations and rights. Granting and denying leaves of absence is covered in chapter 6, and chapter 7 focuses on the discharge, suspension, and demotion of tenured teachers. Discontinuing service by resignation or abandonment is examined in chapter 8. Chapter 9 reports on discharge and demotion procedures. Chapter 10 sets forth appeal rights, including time limitations and hearing procedures. Remedies for wrongful suspension, demotion, or discharge are analyzed in chapter 11. The concluding chapter touches on such miscellaneous topics as transfer of tenured teachers and tenure rights under district reorganization. An appendix provides a reprint of the Tenure Act and tables of court decisions and attorney general opinions. (CJH)

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The Michigan Teacher and Tenure

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The major purpose of this book is to provide teachers with guidelines for understanding their rights under the Tenure Act and help school districts avoid costly errors in administering the Act.

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THE MICHIGAN TEACHER AND TENURE

A STUDY
of
THE MICHIGAN TEACHERS' TENURE ACT
1987

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There is much history behind the Teachers' Tenure Act. Before the Act some school boards for favoritism, politics or other invalid reasons hired and fired teachers in an arbitrary and capricious manner without real regard either to the education of the pupils involved or to the teachers concerned. This was equally injurious to the future of our children, the efficacy and dignity of the teaching profession and the welfare of our State. Only by establishing the right of the teacher during competence and good behaviour to continue in his job once he had proven himself worthy and well qualified could parents and the state be assured their children would receive the education necessary to achieve fulfillment and to fit them to play their full roles in our society. The Teachers' Tenure Act assures that job right.

Justice G. Mennen Williams

(Dissenting opinion in Shiffer v. Bd. of Educ. of Gibraltar Sch. Dist., 393 Mich. 190, 224 N.W.2d 255.)

Preface

Sooner or later, most teachers, school administrators and school board members will be confronted with the need for complete and up-to-date information about the Michigan Teachers' Tenure Act. This 1987 edition of *The Michigan Teacher and Tenure* is an attempt to provide that information.

The need for the 1987 edition has been precipitated by the numerous decisions on the subject that have been issued by the courts and the Tenure Commission since January 1, 1980, when the previous edition was printed. It is the author's belief that more adequate information about tenure would have kept some of these cases from arising.

The 1987 edition is a complete revision. The 1980 edition included seven chapters; the 1987 edition has twelve chapters. Forty court decisions, and over two hundred Commission decisions, were reviewed for this 1987 study and the important legal principles incorporated.

The author has taught courses in school law at Eastern Michigan University. This book is to be used to supplement class instruction and serve as a resource or reference for teachers, teacher organization leaders, attorneys, school administrators and school board members.

A debt of gratitude is owed to those individuals who assisted the author in completing this study. The author wishes to thank Lauren Harkness for her valuable suggestions; and for Joanne Lehman for editing and proof reading. I would be remiss for not expressing my gratitude to Eastern Michigan University. Finally, I wish thank my wife Ellie for enduring without complaint the ordeal of a husband writing a book.

Eastern Michigan University
Ypsilanti, Michigan
February, 1987

Kenneth Grinstead

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CHAPTER I

Overview

Introduction

Teacher tenure is essentially an employment security device by which the teacher attains permanent status and protection against dismissal except for stated cause. It also provides certain procedural safeguards. Tenure systems minimize undesirable aspects of the employment relationship within which teachers work.

Although statutory tenure schemes vary in detail, their general pattern can be described briefly. The new teacher is on probation for a certain number of years, during which time reemployment may be denied at the end of the school year, though dismissal during the year must be "for cause." If reemployed at the end of the probationary period, the teacher then holds his[1] position without further election. A tenured teacher may be dismissed only "for cause" and only after notice accompanied by written charges, opportunity of a hearing and a board of education finding that the charges are valid. The teacher has the right to counsel, and the board is authorized to subpoena witnesses for either side to give testimony under oath. The action of the board is usually subject to review by an administrative body or commission.Of course the teacher is entitled to judicial review, as provided by law.

The rights created under the Michigan Teachers' Tenure Act[2] do not exist under either the federal or state constitutions but are granted exclusively by statute. Hence, the procedural and substantive dimensions of this property right (tenure) are part and parcel of the legislative definition and content of the right.[3]

Development of Tenure Legislation

Teacher tenure as a solution to job security in the profession was discussed as early as 1884, and its development paralleled that of the civil service. In 1883 the abuses existing by reason of the "spoils system" resulted in the first Civil Service Act, designed to curb the excessive turnover of government employees resulting from political changes in government. Tenure for teachers is the application of civil service principles to the teaching profession. It was based on the concept that teaching should be made independent of personal or political influence and freed from the spoils and patronage system.

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[1] The male gender is used throughout this booklet in its generic sense, applying to males and females.

[2] MCLA 38.71 *et seq*; MSA 15.1971, *et seq*.

[3] Rogers v. Trenton Bd. of Educ., 61 Mich. App. 682, 233 N.W.2d 141 (1975).

In 1884 the National Education Association (NEA) created a committee to study the question of tenure. The committee submitted a report recommending the establishment of tenure principles similar in substance to those applied to civil service employees. In 1886 Massachusetts enacted a teacher tenure law which permitted school districts to enter into contracts for periods longer than one year.

The NEA Adopted a resolution in 1915 unequivocally favoring tenure legislation and reaffirmed its position almost every year thereafter. In 1920 the NEA issued its first report devoted exclusively to tenure, and in 1923 the Committee of One Hundred on Problems of Tenure was established. The first report of this committee, issued in 1924, brought to light the job instability in the teaching profession.It reported that statewide turnover of teachers in 1923 ranged from a low of four per cent in Florida to a high of 47 percent in Wyoming, and that in many areas turnover was greater.[4]

In 1960, the Michigan Supreme Court noted that one of the purposes of the Michigan Teachers' Tenure Act was to reduce teacher turnover.[5] Moreover, it was meant to prescribe rules of administrative action for school boards concerning discharge of teachers that would insure a greater degree of security to teachers. The courts quoted the following passage from *The University of Michigan Law Review*, itemizing some of the evils practiced by school boards prior to the advent of tenure legislation:

> The large turnover in the profession was due in part to certain practices which were widespread throughout the country; among them may be noted discharge (1) because of political reasons, (2) because of nonresidence in the community, (3) in order to make places for friends and relatives of board members or influential citizens, (4) in order to break down resistance to reactionary school policies, and (5) in order to effect economies either by diminishing the number of teachers and increasing the amount of work assigned to those retained, or by creating vacancies to be filled by lower salaried, inexperienced employees. Of these practices the first was exceedingly influential in the growth of the tenure movement, some of the more notorious cases of political dismissal challenging the attention of the public to the injury to professional morale and efficiency resulting from the misuse of the control vested in the administrative agencies. The remedy for such abuse was sought in legislation designed to strip the school boards of their autocratic power and to prescribe for them rules of administrative action which would ensure a greater degree of security to their employees.[6]

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[4] *The Problem of Teacher Tenure*, 145 Nat'l Educ. Ass'n. Research Bull. (1924).

[5] Wilson v. Flint Bd. of Educ., 361 Mich. 691, 106 N.W.2d 136 (1960).

[6] Lebeis, *Teacher Tenure Legislation*, 37 Mich. L. Rev. 430 (1939).

In the absence of tenure legislation, the authority of school boards to dismiss teachers almost at will was supported by the courts. The following case is illustrative. In 1916, sixty-eight Chicago teachers with ratings of "satisfactory" and with recommendations of the superintendent for reemployment were dismissed without notice or hearing, and no charges were filed against them. In affirming the school board's action, the Illinois Supreme Court said:

> No person has a right to demand that he or she shall be employed as a teacher.The board has the absolute right to employ or to re-employ any applicant for any reason whatever or for no reason at all. . . . It is no infringement on the constitutional rights of anyone for this board to decline to employ him as a teacher in the schools, and it is immaterial whether the reason for the refusal to employ him is because the applicant is married or unmarried, is of fair complexion or dark, is or is not a member of the trades union, or whether no reason is given for such refusal. The board is not bound to give any reason for its action.[7]

Of course, injury to professional morale and efficiency resulted from misuse of the power such court decisions vested in local boards of education. It was obvious that tenure or permanent status could be achieved only through legislative action rather than through the courts.

In 1939, tenure legislation of one sort or another was in force in nineteen states and the District of Columbia. By 1959, more than three-fourths of the states had some kind of tenure legislation. Since October 1970, a teacher tenure or fair dismissal law has been in effect statewide in thirty-seven states and Washington, D.C. These laws are mandatory and apply to all school districts in the state without exception, although the provisions may vary according to size or class of school district.Eight states have tenure laws that apply to certain designated cities, counties, or school districts. Only five have no tenure laws whatsoever.[8]

Tenure legislation was adopted in Michigan in 1937, but was applicable in each local school district only upon approval by the electors of the district. The Michigan Legislature made the Teacher's Tenure Act applicable to all districts effective August 28, 1964.

Legislative Purpose of Teacher Tenure

As early as 1940, the Minnesota Supreme Court, considered the purpose of tenure legislation existing in that state. Minnesota had adopted tenure for its teachers in 1937. In 1939, one school district discharged its assistant superintendent and all teachers, effective at the close of the school year, on the grounds that it could not determine what their salaries would be because of a possible decrease in state aid. Commenting on the intent of the Minnesota Legislature in adopting teacher tenure, the Minnesota Supreme Court stated:

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[7] People Ex rel. v. City of Chicago, 278 Ill. 318, 116 N.E. 158 (1917).

[8] *Teacher Tenure and Contracts*, 1971-R3 Nat'l Educ. Ass'n Research Rep. 7, (1971).

> The purpose of that teacher tenure act was to do away with the then existing chaotic conditions in respect to termination of teachers' contracts. Until then, in many cases teachers would be left in a state of uncertainty as to whether they would be re-elected for the ensuing year. In many instances this state of uncertainty ran over a period of months. The later in the year that a school board acted, the greater the teachers' disadvantage in finding vacancies elsewhere.[9]

In 1951, the Michigan Supreme Court had its first opportunity to construe the Teachers' Tenure Act in *Rehberg v. Ecorse School District*.[10] It cited with approval several court opinions interpreting similar statutes in other states. The Michigan Supreme Court extracted and summarized these opinions as follows:

> Its (Tenure Act) purpose is to maintain an adequate and competent teaching staff, free from political and personal arbitrary interference. . . . It promotes good order and the welfare of the State and of the school system by preventing removal of capable and experienced teachers at the personal whim of changing office holders. . . . (T)he purpose of the act is to protect and improve State education by retaining in their positions teachers who are qualified and capable and who have demonstrated their fitness, and to prevent the dismissal of such teachers without just cause.[11]

The Court noted, however, that it was not the purpose or intention of the Act to deprive school boards of administrative control over teachers, and that except for protecting teachers from arbitrary or unreasonable dismissal, it did not diminish or interfere with the administrative power of local boards of education.

After the *Rehberg* decision, other Michigan Courts opined on the purpose of the Teacher's Tenure Act. A panel of the Court of Appeals stated"

> The purpose of the Teachers' Tenure Act was to eliminate capricious employment practices by school boards and protect teachers from arbitrary and unreasonable dismissals, thus ensuring a greater degree of security.[12]

Another Court of Appeals panel cited three basic principles of the Teachers' Tenure Act: (1) to protect teachers' rights, (2) to provide a remedy to protect teachers from discriminatory practices in hiring, promotion and fringe benefits; and (3) to provide a hearing by the board of education which comports with procedural due process before a tenured teacher can be discharged.[13]

The Michigan Supreme Court has also held that the intent of the Teachers' Tenure Act was to eliminate capricious and arbitrary employment practices of local school boards against probationary as well as tenured teachers.[14] Justice G. Mennen Williams has stated that tenure legislation is "dedicated to taking teachers out from under the thumb of arbitrary action by school boards" and the

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[9] Downing v. Independent Sch. Dist. No. 9, 207 Minn. 292, 291 N.W. 613 (1940).
[10] 330 Mich. 541, 48 N.W.2d 142 (1951).
[11] Id. at 545, 48 N.W.2d at 144.
[12] Blurton v. Bloomfield Hills Bd. of Ed., 60 Mich. App. 741, 744, 231 N.W. 2d 535, 537 (1975.
[13] Davis v. River Rouge Sch. Dist., 73 Mich. App. 358, 362, 251 N.W. 2d 585, 587 (1977).
[14] Munro v. Elk Rapids Schs., 385 Mich. 618, 189 N.W.2d 224 (1971).

"Legislature's whole purpose in the teachers' tenure act was to preserve the integrity of teachers' tenure, or right to continue in his job."[15]

More recently the Michigan Supreme Court held that the general purpose of the Tenure Act is to resolve conflicts between the teacher and the school board without the necessity of court action[16] and to prohibit the arbitrary use of power.[17]

In summary, it can be said that the Michigan Teachers' Tenure Act was passed for the protection of teachers, not to take away their rights.[18]

Advantages and Disadvantages of Tenure

Advantages

Tenure may be viewed as a desirable safeguard, since the tenured teacher is free from worry over renewal of his contract and can concentrate on teaching. Scholarship cannot flourish under a cloud of suspicion and mistrust; the security provided by tenure can help create a learning climate conducive to academic freedom. It also allows the teacher to exercise leadership outside the classroom despite any possible unpopularity of his individual views. He must be permitted to exercise the responsibility of teaching in an atmosphere of open inquiry, free from the inhibiting effects of misuse of the power to hire and fire.

Teacher tenure indirectly protects students' freedom to learn. Teachers who are secure in their own positions can devote full time to the pursuit of truth without fearfully looking over their shoulder to see whether their conduct is approved by the board of education, the superintendent or principal.

Tenure legislation sets up orderly and definite procedures by which undesirable people may be removed from the teaching profession. It allows for the maintenance of an adequate and competent teaching staff, free from arbitrary political and personal interference.

Disadvantages

Opponents of teacher tenure cite a number of disadvantages to school systems. Secure employment may attract the dull, less-adventurous teacher who desires a steady job rather than an opportunity for intellectual experimentation, inquiry, and change. A few teachers, knowing that they can maintain minimal output and still retain their jobs, may grow stale.Due to a short probationary period, both the teacher and the school district may suffer by a forced decision to grant or deny tenure before the teachers' capabilities have been demonstrated. Teachers who are able to hide behind the protection of tenure to shelter their own incompetent behavior are detrimental to the reputation of the entire teaching profession.

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[15] Shiffer v. Gibraltar Schs., 393 Mich. 190, 210, 224 N.W.2d 255, 265 (1974).

[16] Lipka v. Brown City Schs., 399 Mich. 704, 252 N.W.2d 770 (1977).

[17] Rockwell v. Crestwood Sch. Dist., 57 Mich. App. 636, 226 N.W.2d 596 (1975); *rev'd* on other grounds, 393 Mich. 616, 227 N.W.2d 736 (1975).

[18] Bruinsma v. Wyoming Public Schs., 38 Mich. App. 745, 197 N.W.2d 95 (1972).

Another argument against the tenure system is that it requires time-consuming and expensive dismissal proceedings. The proceedings may generate hostility and tension with the administration pitted against the teacher and his union.

But some of these disadvantages are not a result of teacher tenure laws; they are rather the fault of ineffective administrators. In its booklet *Teacher Tenure Ain't the Problem*, the American Association of School Administrators stated:

> It is unfortunate but true that there is a substantial number of administrators who simply do not have the professional courage, or do not want to take the trouble, or who do not know how, to document charges that would lead to justified dismissal of the poor teacher. In such cases, it is very true that tenure laws protect and preserve weak and inept administrative practices, not just weak and inept teachers.[19]

The potential for psychological stress and pressures from teacher organizations or other sources may deter some school administrators from initiating dismissal proceedings.

School boards must also share some of the blame for the retention of incompetent tenured teachers. The time involved, the publicity, and the expense accompanying a full tenure dismissal hearing may lead a school board to decide it is easier to retain incompetent teachers than to terminate them through tenure proceedings.

Effective evaluation techniques, appropriate documentation, courage, good legal advice, and a school board dedicated to maintaining a competent teaching staff will over come nearly all the disadvantages inherent in teacher tenure.

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[19] *Teacher Tenure Ain't the Problem*, Am. Ass'n of Sch. Administrators (1973).

CHAPTER II

Certification and Tenure Rights

The interpretation and application of the Tenure Act is often dependent upon the proper certification status of the teacher. The legal principles associated with these issues are discussed in this chapter.

Legal Basis for Certification

A local board is statutorily obliged to staff teaching positions with certificated teachers. The law says that "the board of any district shall not permit any teacher without a valid Michigan teaching certificate to teach in any grade or department of the school,"[1] and that if a controlling board assigns an uncertificated person to a teaching position it risks imposition of a penalty.[2] The Tenure Commission has decided that certification is "the threshold consideration" in teacher selection.[3]

The School Code provides that certification is to be defined and granted by the State Board of Education:

> The State board shall determine the requirements for and issue all licenses and certificates for teachers, including preprimary teachers, and the requirements for an endorsement of teachers as qualified counselors in the public schools of the state.[4]

The eligibility of persons employed by school boards to be covered by the provisions of the Teacher's Tenure Act is determined by the term "certificated . . . as defined by the State Board of Education".[5] As used in the Tenure Act, the word "certificated" means a teacher who holds a valid certificate for the position he is assigned. This is the construction given the word by the State Board of Education.

Certification Responsibility

A teacher's failure to hold a proper certificate is an acceptable reason for termination, layoff, or denying reappointment.[6] If a teacher fails to become certificated, or is initially certificated[7] but then loses certification status, he loses his tenure status[8] and any rights and privileges under the Tenure Act.

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[1] MCLA 380.1233, MSA 15.41233.

[2] MCLA 388.1763, MSA 15.1919(1062).

[3] Rogers v. Bd. of Educ. Clio Area Schs., TTC 81-78 at 11.

[4] MCLA 380.1431(1), MSA 15.1453(1).

[5] MCLA 38.72, MSA 15.4153(1). See 94 A.L.R.3d 141 "Who is teacher for purposes of tenure statute."

Neither the Tenure Act, state statutes, nor State Board of Education rules require that a board of education notify a teacher that his personal certificate has expired. The responsibility for the acquisition and maintenance of certification rests with each individual teacher. A school board is not required to assume any of the obligations that may arise in teachers' attempts to achieve proper certification.

It is the teacher's responsibility to notify the employing school board of his certification status.[9] A teacher's failure to do so removes any obligation the school board might have to assign him to classes or subjects for which he has not reported certification status.[10] In *Arnold v. New Haven Community Schools*, the Tenure Commission stated:

> [W]e note the following factors present here which impact on the certification question. Regarding the thirty-hour continuing certificate, the Board was informed Appellant was seeking it and provided information to Wayne State University supporting Appellant's application for it. Yet, Appellant did not notify the Board he had received it, nor did he submit a copy of it to the district. Thus, the Board was unaware of the subjects and grades for which Mr. Arnold was certified under the certificate. Therefore, we will not hold the Board liable for failing to offer Appellant positions covered by the thirty-hour continuing certificate.[11]

When is a Teacher Certificated?

The issue of when a teacher becomes certificated to teach a particular subject or grade has been addressed in several tenure decisions.This matter appears to have been resolved by a 1983 legislative addition to the certification code:

> For purposes of endorsement or recertification, a teacher shall be considered certificated and the holder of a valid teacher's certificate on the completion date of the requirements of a teacher education college, as defined by the college catalog of courses, until such time as the certification is confirmed or rejected by the state board of education.[12] (1983 PA 118, which adds Section 1535 to the School Code of 1976, MCLA 380.1535; MSA 15.41535. This section became effective July 18, 1983).

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[6] Page v. Harper Woods Schs., TTC 73-60-R; Williams v. Cheboygan Sch. Dist., TTC 63-3.

[7] Williams v. Cheboygan Sch. Dist., TTC 63-3.

[8] Wilkins v. Avondale Sch. Dist., TTC 73-4; Pfauth v. Galien Bd. of Educ., TTC 70-21.

[9] Wilkins v. Avondale Sch. Dist., TTC 73-4; Williams v. Cheboygan Sch. Dist., TTC 63-3; Rogers v. Taylor Tp. Sch. Dist., TTC 66-1.

[10] Brisbois et al. v. Garden City Schs., TTC 82-33; Suckley v. Warren Woods Sch. Dist., TTC 81-38; Arnold v. New Haven Community Sch. Dist., TTC 79-11.

[11] TTC 79-11 at 11-12.

[12] 1983 PA 118, which adds Section 1535 to the School Code of 1976, MCLA 380.1535, MSA 15.41535.

Suckley v. Warren Woods Public Schools,[13] illustrates the problem of deciding when a teacher actually became certificated prior to the enactment of the above section. Suckley taught under an elementary certificate. She had earned all the credits necessary to receive a learning disabilities endorsement by the end of the summer term of 1980. A representative of Oakland University, where she completed her learning disabilities course work, advised the Warren Woods Board on October 2, 1980, that Suckley would be recommended for a learning disabilities endorsement.

Suckley was laid off on October 30, 1980. At that time there was a vacant special education position for a teacher of the learning disabled. The board retained a probationary teacher in this position. Suckley believed she should have been given the assignment. The Department of Education issued a continuing elementary certificate with learning disabilities endorsement to Suckley in March, 1981, bearing the date November 17, 1980.

The Commission held that a teacher is not certificated until the Department of Education actually issues a certificate to the teacher. Because Suckley had not received the certificate from the Michigan Department of Education at the time the learning disabilities vacancy occurred, the board was not obligated to place her in that position.

The fact that Suckley's teacher preparation institution recommended her for the learning disabilities endorsement was not controlling. Because the vacant position was not within Suckley's certification at the time she was laid off, the board was not obligated to assign her to the learning disabilities vacancy. The Commission subsequently applied its *Suckley* ruling in *Vanspybrook v. Hartland Consolidated Schools*.[14]

The 1983 amendment to the School Code now states that "a teacher shall be considered certificated and the holder of a valid teacher's certificate on the completion date of the requirements of a teacher education college" with the proviso that the certificate is valid until it is confirmed or rejected by the State Board of Education. The provision probably does not have retroactive application.

Sometimes it may not be advantageous for a teacher to divulge his complete certification status. For example, the district in *Brisbois et al. v. Board of Education of Garden City*,[15] had a policy, during staff reduction, of transferring general education teachers holding special education certification to special education positions. Teachers employed in special education generally had the lowest seniority. Thus, the board's policy was intended to increase flexibility in staffing during layoffs and ensure that the teachers with the highest seniority in the district would be retained. The district made its staffing decisions based on the certification and endorsement documentation filed with the district by the individual teachers. Several teachers who held special education certification had not informed the district of this fact. These teachers were scheduled to teach in general education. Had these teachers been transferred to special education classes, other teachers could have been retained. Because these teachers had not filed their certificates with the board, the district had no authority to make the transfers. The Commission held that the district could not require the teachers to file their certificates. Nor was the district required to search the records of the Michigan Department of Education to determine whether any of its employees had earned new certification.

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[13] TTC 81-38.
[14] TTC 82-41.
[15] TTC 82-23.

State Board Definitions

The State Board has defined certification requirements for Tenure Act applicability separately for probationary teachers and for tenured teachers.[16] (These definitions are given in the Appendix).

Applicability

The Michigan Teachers' Tenure Act is applicable to "all certificated persons employed for a full school year by any board of education or controlling board of any public educational institution."[17] Only upon being granted the certificate by the State Board is a teacher considered "certificated" to teach in a certain subject area. Also, an individual must be "certificated" within the meaning of the Teachers' Tenure Act in order to gain its protection.[18] A non-certificated person has no standing before the Tenure Commission. The failure to hold the appropriate certificate may be the basis for one's termination when the district engages in a necessary reduction in personnel, and is proper reason for denying reappointment.[19]

School Districts

The application of the Tenure Act is limited to public institutions operated by school districts that are required to employ certificated teachers. The Act does not apply to community colleges[20] even those operated as part of a school district since there are no provisions for certifying community college instructors.[21] Nor does the mere holding of an elementary or secondary certificate by a person employed by a community college bring that person under the provision of the Teachers' Tenure Act.[22]

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[16] R. 390.661(a) and (b). Part (a) provides that during the probationary period a person must hold a "certificate which is valid for the position to which he is assigned."Once a person has achieved tenure status, however, he or she is "certificated" merely by holding any of the various certificates listed in the Part (b).

[17] MCLA 38.71, MSA 15.1971.

[18] Shaw v. Macomb County Community College, 37 Mich. App. 96, 194 N.W.2d 558 (1971); Ishmiel v. Mich. Dept of Educ., TTC 84-15 and 84-16; Page v. Harper Woods Public Schs., TTC 73-60-R; Wilkins v. Avondale Sch. Dist., TTC 73-4; Williams v. Cheboygan Area Sch. Dist., TTC 67-3. In *Ishmiel*, the Commission held that employees of the Michigan Department of Education at the School for the Deaf were not entitled to protection of the Tenure Act.

[19] Paeth v. Montague Area Public Schs., TTC 80-33; Page v. Harper Woods Public Schs., TTC 73-60-R; Williams v. Cheboygan Area Sch. Dist., TTC 67-3.

Teachers in intermediate school districts, as well as teachers in junior colleges which are part of a local school district, are covered by the Act.

Ineligible Positions

The tenure rights of certificated persons holding positions for which certification is not required has been an issue in several Commission decisions.A person who holds a teaching certificate cannot acqire the protections of the Teachers' Tenure Act by just holding any position in a public school district. The mere holding of a valid teacher's certificate by a school employee who occupies a non-instructional position such as bus driver, cook, custodian, or secretary does not entitle the employee to coverage under the Tenure Act. This issue has been before the Commission on numerous occasions.

In *Justian v. Jackson Intermediate School District*, the Commission held that it had "frequently interpreted article 1, section 1, of the Tenure Act, which defines 'teacher', to require that an individual not only be certificated but employed in a position for which certification is required."[23]

A school diagnostician,[24] a school attendance worker,[25] an employment project director,[26] an adult education teacher,[27] a school nurse,[28] a school social worker,[29] a school psychologist,[30] a school business manager,[31] and a teacher aide,[32] have been held not to qualify as certificated teachers for purposes of the Teachers' Tenure Act.

In *Greaney v. Van Dyke Public Schools*,[33] the Tenure Commission held that a school nurse who held a professional school nurse certificate was not "certificated" within the meaning of the Tenure Act. The Commission reasoned that the administrative rules do not require school nurses to hold a certificate issued by the Michigan Department of Education in order to be properly employed in Michigan schools for the public. Although the legislature authorizes the State Board of Education to establish certification requirements for school nurses,[34] this provision does not require school nurses to hold a certificate as a condition of employment. Nor did the State Board of Education include a provision making certification mandatory when it promulgated the administrative rules regarding certification for school nurses. The Commission also noted in *Greaney* that when the Department of Health developed its health plan for school students it only encouraged, but did not require, employment of individuals certificated by the Department of Education as school nurses.

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[20] Williams v. Sch. Dist. Highland Park, TTC 79-9. The State Board of Education cannot validly promulgate rules for certification of community instructors.1961-62, p. 239, OAG No. 3478 (January 24, 1962).

[21] Shaw v. Macomb County Community College, 389 Mich. 69, 202 N.W.2d 129 (1973).

[22] Shaw v. Macomb County Community College, 37 Mich. App. 96, 194 N.W.2d 558 (1971).

[23] TTC 76-48 at 2.

[24] Split v. Grand Haven Bd. of Educ., TTC 73-1.

[25] Roundtree v. Ecorse Bd. of Educ., TTC 74-37.

[26] Justian v. Jackson Intermediate Sch. Dist., 76-48.

[27] Kellerman v. Bay City Public Schs., TTC 78-50-R; Rule v. Lansing Sch. Dist., TTC 82-35; Marsh v. Airport Community Schs., TTC 81-34.

[28] Greaney v. Van dyke Public Schs., TTC 83-25 and 83-45.

[29] Id.

[30] Oates-Ulrich and Meese v. Okemos Public Schs., TTC 82-24-R.

[31] Marshall v. Melvindale-Northern Allen Park Public Schs., TTC 84-1.

[32] Cook v. Sturgis Public Schs., TTC 77-13, aff'd Cook v. Sturgis Public Schs., 144 Mich. App. 427, 375 N.W.2d 740 (1984).

[33] TTC 83-25 and 83-45.

In *Kellerman v. Bay City Public Schools*,[35] a majority of the Commission held that because adult education teachers are not required to be certificated, they are, therefore, not "certificated" teachers for purposes of the Tenure Act. The Commission adopted this position even though, in the view of the Michigan Department of Education, the teachers held valid teaching certificates for their assigned positions. The Commission applied the same ruling in subsequent decisions.[36]

In *Justian v. Jackson Intermediate School District*,[37] the Commission found that the position of employment project director did not require certification as a teacher; nor did the duties actually performed by Justian in the position involve instruction, counseling of students, or classroom work. Justian's duties involved serving as a coordinator and resource person for students, teachers, counselors, businesses and public agencies.

In *Marshall v. Melvindale-Northern Allen Park Board of Education*,[38] the Commission held that a school business manager who held a valid teaching certificate did not, while serving as business manager, complete the mandatory two-year probationary period necessary for gaining tenure as a classroom teacher.

Teaching Without a Certificate

The Commission's decision in *Hollister v. Burr Oak Schools*[39] establishes the principle that even if the State Department of Education or a school district permits a teacher to teach without a valid certificate, that teacher is not certificated within the meaning of the Tenure Act. Hollister was unable to produce a valid certificate by the commencement of the 1982-83 school year because she had not completed the necessary university course work. Nevertheless, she was permitted to teach based upon the understanding that she would make her best effort to obtain the required credits for certification. She was unable to complete the course work and was dismissed from employment on February 9, 1983. The Commission held that even though the Burr Oak Board allowed Hollister to teach, and knew she was in the process of completing her credit requirements to obtain a continuing certificate, such approval could not make her a certificated teacher for purposes of the Tenure Act.

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[34] MCLA 380.1252, MSA 15.41252.

[35] TTC 78-50-R. When *Kellerman* reached the Court of Appeals, it was held that Bay City adult education teachers did not meet the definition of teacher because they were not employed for a "full school year" as required in MCLA 380.1284, MSA 15.41284. The Court did not address the certification issue.

[36] Rule v. Lansing Sch. Dist., TTC 82-35; Marsh v. Airport Community Schs., TTC 81-34.

[37] TTC 76-48.

[38] TTC 84-1.

[39] TTC 83-20.

Hollister claimed that a teacher's provisional certificate remains valid and does not expire until a decision is made on an application for a continuing certificate by the the State Board. The Commission rejected this argument. The Teacher Certification Code provides that all certificates expire on June 30 of the expiration year indicated on the certificate. The Code further provides that "[t]o be qualified for teaching at expiration of an elementary or secondary provisional certificate, an applicant shall qualify within the provisional period for a continuing certificate."[40]

Special Permits and Vocational Authorizations

The State Board of Education has ruled that "certificate" as used in MCLA 380.651(b), MSA 15.465(b) includes a provisional, permanent, continuing and thirty-hour continuing certificates but does not include state special permits and vocational authorizations[41] which are not identified as certificates in the administrative rules.[42] In addition, the requirements for these authorizations and permits are substantially different from those of the teacher certificates identified in the rules. Persons teaching under these authorizations and permits are not required to have completed a professional teacher education program. Annual vocational authorizations are issued to school districts, rather than to individual teachers, and are valid only for teaching certain course in approved programs. There are no specific requirements that a vocational teacher have completed any number of semester hours of college credit to qualify for such an authorization.

In *Gretzinger v. State Board of Education*,[43] a school superintendent requested a determination that annual vocational authorizations and a state special substitute teacher permit that had been issued to the COOR Intermediate School District on his behalf be considered "teacher's certificates" within the meaning of MCL

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[40] 1973 AACS, R. 390.1101.

[41] Gretzinger v. State Bd. of Educ., 121 Mich. App. 247, 328 N.W.2d 544 (1981).

[42] 1973 AACS, R. 390.1101. In Rogers v. Clio Area Schs., TTC 81-78, the Commission stated, "Substitute certificates do not constitute 'certificates' under the Teachers' Tenure Act."

[43] 121 Mich. App. 247, 328 N.W.2d 544 (1981).

380.651(b), MSA 15.4651(b). The court ruled that such authorizations and permits are not identified as certificates in the administrative rules of the State Department of Education.

In *Paeth v. Montague Area Public Schools*,[44] the question was whether a local board of education was required to obtain a "special permit" to place a tenured teacher into a position for which he was otherwise not certificated. The teacher was not certificated to teach elementary science, but he contended that the board should have obtained a special permit to teach it. The Tenure Commission held that because the Montague Board had a probationary teacher who was certificated for the position, it did not have to request the special permit for Paeth. The Commission cited 1973 AACS, R. 390.1101 *et seq.*, R. 390.1141(2):

> (2) A permit or renewal is issued to the recommending superintendent or personnel officer who shall apply therefore and *affirm under oath that a certificated teacher is not available for employment*. The recommending superintendent or personnel officer receiving the permit or renewal shall hold the permit or renewal for the person. (emphasis added)

The Commission's decision in *Paeth* follows an earlier decision in *Williams v. Cheboygan Area School District*.[45] Williams was not eligible for full certification, and his superintendent declined to request a special permit for him because a teacher with full certification was available. The Commission ruled that when Williams' certificate expired he lost his certification, his tenure, and his right to appeal to the Commission.

In *Douglas v. School District of Detroit*,[46] the Commission held that an annual authorization was not sufficient to bring an individual within the definition of certificated person. The Commission stated:

> It is the opinion of the Commission that once attained tenure is on a continuing basis. Thus, the Teachers' Tenure Act could not contemplate the achievement of tenure status by a teacher holding any type of certificate or authorization that would be valid for only a term of one school year.[47]

The Commission reached a similar decision in *McKinney v. Plymouth-Canton School Board*.[48]

However, a board of education cannot ignore completely the interrelationship of the Tenure Act and annual vocational authorizations. In *Goodrich v. School District of the City of Pontiac*,[49] a tenured teacher on layoff was deemed by the Tenure Commission as better qualified for a welding assignment than an employed probationary teacher for whom it had obtained an annual authorization.

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[44] TTC 80-33.

[45] TTC 67-3. Accord: Rogers v. Taylor Tp. Sch. Dist., TTC 66-1.

[46] TTC 76-11.

[47] Id. at 3.

[48] TTC 79-60.

[49] TTC 78-46.

The Commission ruled that it was within the school board's obligation to decide which teacher was the best qualified for the welding assignment and seek the authorization for that person from the State Department of Education. The Commission concluded that Goodrich would have been a more suitable candidate than the probationary teacher for the authorization and directed that he be placed in the contested position.

Special Substitute Certificates

Possession of a state special substitute permit does not qualify a person for tenure. These permits are issued to "the recommending superintendent or personnel officer who shall apply therefore and affirm under oath that a certificated teacher is not available for employment."[50] Such permits allow a person to teach for only 90 days and may be issued for the benefit of persons with educational backgrounds which would not qualify them to become certificated teachers.

Alternative Education Programs

In *Bode v. Roseville Board of Education*,[51] the teacher argued that an alternative education program required that teachers possess a valid certificate for the specific subject area they were assigned to teach. It is the State Department of Education Teacher Certification Unit policy that it is the local board that determines who is qualified to teach in alternative education programs and that determines whether to use an elementary or secondary certificated person.The Commission held that the Tenure Act was not violated when the Roseville Board assigned a teacher certificated in all subjects in grades seven and eight to teach in the high school alternative education program.The decision was based on program needs.

Teacher Consultant Approval

A controlling board of education is under no obligation to recommend teachers who lack certification in a cognitive disability area for teacher consultant approval. In *Garza and Lecznar v. Taylor School District*,[52] the district had followed a practice of limiting its recommendations for teacher consultant approval to teachers with certification for teaching either learning disabled (LD) or educable mentally impaired (EMI) students. The district's justification for using this criterion was that the population receiving teacher consultant services was overwhelmingly composed of LD and EMI students. The Department of Education will approve use of teacher consultants with expertise in the disability area being served as reasonable and appropriate. Garza and Lecznar held certificates authorizing them to teach emotionally impaired students but did not meet the district's additional requirements. The Commission ruled that the Board's refusal to recommend Garza and Lecznar for teacher consultant approval did not violate their Tenure rights.

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[50] 1973 AACS, R. 390.1141(2).
[51] TTC 80-46.
[52] TTC 82-53.

Layoff and Recall Issues

The linkage of teacher certification to layoff and recall issues under the Tenure Act has provoked several Tenure Commission decisions. It is quite clear that the legal requirements of certification must always be met in layoff and recall matters. In *Rogers v. Clio Area Schools*, the Commission stated:

> While determination of qualification is provided for as an adjunct to certification in the selection process, qualification cannot and does not supercede the basic requirement of certification. When a school board chooses between a qualified but uncertified individual and a certified tenured teacher, not qualified according to board standards, compliance with certification requirements must prevail.[53]

Terminating certificated teachers, while retaining teachers that the school board should have known were uncertificated to teach constitutes a subterfuge.[54] Such actions on the part of a school board frustrate the purpose of the Teachers' Tenure Act—to improve education by protecting capable and experienced teachers from arbitrary and capricious actions.[55]

Hadaca and Kukura v. Northwest Board of Education[56] illustrates the application of this principle. Kukura was certificated to teach industrial arts in grades K-12 and all subjects in grades 7-8. He had been assigned to teach industrial arts at the junior high school prior to his layoff. At the start of the 1982-83 school year, the industrial arts classes were taught by another teacher, Morin, who was certificated to teach industrial arts, physics, and mathematics in grades 9-12 and all subjects in grades 7-8. Moris was not certificated to teach at the elementary level (K-6). He taught only 7th and 8th grade students during the first semester. Beginning with the second semester, however, some 6th-grade students were enrolled in Morin's industrial arts classes as well. The addition of these 6th-grade students rendered Morin uncertificated for his assignment. The Commission held that Kukura, who was fully certificated and qualified for Morin's position, should have been recalled. Kukura was awarded reinstatement and salary lost as a result of the wrongful action.

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[53] TTC 81-78 at 11.

[54] Marenettee and Oldani v. Roseville Sch. Dist., TTC 80-6.

[55] Rehberg v. Melvindale-Ecorse Sch. Dist., 330 Mich. 541, 48 N.W.2d 142 (1951); Munro v. Elk Rapids Schs., 383 Mich. 661, 178 N.W.2d 450 (1969).

[56] TTC 83-36 and 83-37.

CHAPTER III

Probationary Service

A beginning teacher must complete a satisfactory probationary period of two years to attain tenured status.[1] The problem of determining what service counts toward completion of the two-year probationary period has generated a substantial number of court and Tenure Commission decisions.

Probationary Period Defined

The Tenure Act provides: "All teachers during the first two school years of employment shall be deemed to be in a period of probation."[2] Only that time during which a teacher is providing *full* services to a school district will count as the employment required for the probationary period.

Probation is intended to be a period of proof, a trial period—a time when a teacher must demonstrate satisfactory performance. During this period the board must determine whether or not the services provided by the teacher meet the district's needs, policies, and performance standards. Unless required to complete a third year of probation,[3] the teacher attains tenure after serving for two years.

A teacher acquires tenure in a school district rather than in a particular school building, grade level, department, or program. It is not necessary to serve the two probationary years in the same school building or under the same building administrator. It is mandatory, however, that the two years be served in the same school district.

Service That Counts Toward Fulfilling the Probationary Period

Several decisions define the employment that will satisfy the fulfillment of the probationary period.

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[1] MCLA 38.81, MSA 15.1981. This period cannot be shortened by a controlling board by policy or contract. Ellis v. Wakefield Tp. Sch. Dist., 79 Mich. App. 347, 261 N.W.2d 320 (1977).

[2] MCLA 38.82, MSA 15.1982.

[3] Third year of probation is discussed in a later section of this chapter.

School Administrators[4]

A person can complete a probationary period and acquire tenure as a classroom teacher while serving in administrative positions that require certification. These include the positions of superintendent[5] and where a local board required the administration to hold a teaching certificate,[6] but not in administrative positions for which teacher certification is not required.[7] Several decisions illustrate this principle.

In *Savel v. Clintondale School District*,[8] the claimant's first appointment in a Michigan public school district had been to the position of superintendent. When the board decided to terminate Savel's services as superintendent, Savel claimed he had achieved tenured status as a teacher and was entitled to a classroom teaching position. The board argued that Savel did not have a right to placement in a classroom position when he was released as superintendent because he had never completed a probationary period in the classroom. In ruling in favor of Savel, the Commission relied on the decision in *Bode v. Roseville School District*,[9] where the Court held that the term teacher as used in the Act was sufficiently broad to include superintendents. Like Savel, the teacher in *Bode* had never completed a probationary period in a classroom position. Nevertheless, the majority determined that Bode's employment as superintendent was sufficient service to complete the probationary period and that consequently, he was entitled to employment as a tenured classroom teacher when his superintendent contract was terminated. The fact that neither Savel nor Bode had taught in a Michigan classroom did not prevent their being credited with completion of the probationary period.

The Court in *Bode* also addressed the issue of whether Bode's superintendent contract, that excluded tenure in his administrative position, also precluded acquisition of classroom tenure. Bode was employed under a contract that contained the following clause:

> The Superintendent of Schools shall not be deemed to be granted continuing tenure by virtue of this agreement.

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[4] See "Acquisition of Teacher Tenure While Serving As an Administrator" in Chapter V, "Tenure Rights in Non-Classroom Positions."

[5] Fellows v. Livingston Intermediate Sch. Dist., TTC 82-16; Munger v. New Buffalo Bd. of Educ., TTC 82-6; Strohl v. Jackson Public Schs., TTC 79-8; Savel v. Clintondale Sch. Dist., TTC 78-48; Lindner v. Ypsilanti Sch. Dist., TTC 70-24; Anderson v. Westwood Community Sch. Dist., TTC 70-13; Madison v. Lakeview Sch. Dist., TTC 68-17. This rule is applicable only for the purpose of completing of the probationary period. See definition of "certificated" in R 390.661(1). Except in school districts of the first class, superintendents are required to hold teaching certificates.MCLA 380.1246, MSA 15.41246.

[6] Loeffler v. Monroe Public Schs., TTC 84-25. (Board required the administrator to hold a teaching certificate).

[7] Race v. Fruitport Community Schs., TTC 84-12; Marshall v. Melvindale Northern Allen Park Schs., TTC 84-1.

[8] TTC 78-48.

[9] 405 Mich. 517, 275 N.W.2d 190 (1979).

The majority of the *Bode* Court had found this contract provision ineffective to prevent the acquisition of classroom tenure. In *Savel*, the Commission applied the same reasoning. Because Savel did not receive notice that his work was unsatisfactory at the end of his two-year probationary period, he gained continuing tenure as a classroom teacher after two years of service as superintendent.

The principles described in *Savel* and *Bode* apply to those administrative positions that require the incumbent to hold a valid Michigan certificate for the specific position he holds.[10] However, service by certified teachers in other types of administrative or supervisory positions does not constitute probationary service, because the holding of these positions does not require possession of a teaching certificate. For example, in *Marshall v. Melvindale-Northern Allen Park Public Schools*,[11] the Commission held that a certified teacher did not complete the probationary period while serving as business manager even though he possessed a valid teaching certificate while serving in that capacity.

These rulings are applicable only to the acquisition of probationary service credit while serving as a school administrator.[12] Once a person completes the required probationary period, he may accept an administrative position in that district and retain tenured status as a classroom teacher.

A person may accrue probationary service credit and teacher tenure while serving as an administrator of adult education.[13] This is true in spite of the Commission's decision in *Kellerman v. Bay City Schools*[14] that adult education instructors cannot complete the probationary period and acquire teacher tenure while serving as adult education teachers.

Service as Substitutes and Teacher Aides

For teaching service to be counted toward the fulfillment of the probationary period, the work rendered must be by a teacher fully responsible for the classroom. In determining whether the teacher in question has had full responsibility, the Commission must look to and is controlled by the nature of the duties performed.

At issue in *Ward v. Cadillac Area Public Schools*[15] was whether service as a substitute teacher could count toward the two-year probationary period. The service was described as follows:

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[10] State Department of Education R 390.661(a).

[11] TTC 84-1. Race v. Fruitport Community Schs., TTC 84-12. In *Race*, the claimant was an assistant principal. The Attorney General has held that assistant principals are not required to hold teaching certificates nor is the State Board of Education currently authorized to mandate that assistant principals be certificated. OAG 1964-65, No. 4143, p. 172 (August 9, 1963).

[12] Oates-Ulrich v. Okemos Sch. Dist., TTC 82-24-R.

[13] Loeffler v. Monroe Public Schs., TTC 84-25. It is not clear whether the administrator had acquired tenure previously while serving as a teacher.

[14] TTC 80-50-R.

[15] TTC 79-16.

> During the 1976-77 school year, appellant was employed, beginning November 1, 1976, through the end of the school year, to teach a fifth grade class. The first day of work for teachers that school year was September 9, 1976, and the students reported September 10, 1976. Teachers began work August 29, 1977, for the 1977-78 school year and the students' first day of school was August 30, 1977. Appellant was employed sporadically as a substitute from the beginning of the 1977-78 school year until November 25, 1977. Starting on November 25, appellant was employed to replace a teacher who had been granted a leave of absence due to illness. Appellant continued in this position through the end of the school year. Appellant was employed throughout the 1978-79 school year. In the fall semester, appellant replaced a teacher who was on maternity leave. Thereafter, appellant was retained through the end of the school year and performed as a "traveling substitute."[16]

The Commission found that Ward had rendered service for substantial periods of time on a regular, continuous, and pre-arranged basis during the months she replaced specific teachers. Ward functioned as a teacher fully responsible for the classroom during these periods; therefore the service could be counted as part of her probationary period.[17]

The Commission ruled that this rationale could not apply to the period when Ward was employed sporadically as a substitute teacher. During these assignments she did not perform the course planning, lesson planning, or grading functions normally associated with a teaching position. The Commission stated:

> We do not believe that the purpose of the probationary period is fulfilled by including periods of irregular service in positions which do not require the employee to perform the normal functions required of a person regularly employed in that position. The opportunity to evaluate the teacher's performance is too diminished, as is the scope of performance to be evaluated.[18]

In *Cook v. Sturgis Public Schools* the Commission was confronted with whether the teacher had performed services as a teacher or paraprofessional. The Commission provided the following criteria for making such a determination:

> The Certification code does not specifically define the term teacher. However, one who is employed with instructional responsibilities is required to hold a certificate R 390.1105. Further, OAG 1963, No. 4143 (9/6/63) defines teacher as one who is employed for instructional purposes. The term "instruct" means to give knowledge or information to; to impart knowledge to in a systematic manner. Webster's *New Collegiate Dictionary* (G and C Merriam Company, 1974) p. 599.[19]

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[16] Id. at 3.

[17] Id. at 4. The Commission cited Minneapolis Fed'n of Teachers v. Minneapolis Special Sch. Dist. No. 1, 270 N.W.2d 773, 776 (1978) as rationale for its ruling. However, see decisions in Chapter V on "Layoff and Recall" that the full responsibility test does not apply when determining whether a vacancy exists for purposes of recall.

[18] Id. at 4-5.

[19] TTC 77-13 at 5-6.

Because the structure of the program provided Cook with meaningful direction and supervision by a certified teacher, the Commission found that she had served as a paraprofessional.

The Commission's decision in *Cook* also established another important principle. Service in a position where a teacher does not hold the proper certification does not count toward the probationary period. Though hired to fill a position in the counseling office, the Commission found that Cook did not hold counselor endorsement nor perform the services of a counselor. For these reasons, the Commission deemed that the work did not count as probationary service. In affirming the Commission, the Court stated:

> While it is clear that petitioner was certified to teach all subjects in the 7th and 8th grades, she was employed by respondent in the guidance department of the Sturgis Middle School. Petitioner did not hold a counseling endorsement. In her duties in the guidance department, she interviewed students for the school's year-end survey, then later acted as a math tutor for individual students who needed extra assistance in that area. Her math tutoring consisted of providing the students with drill sheets, correcting their work and reviewing erorrs with them. It is clear that her work complemented and supplemented the instruction given the students in the regular classroom and was consistent with the duties of a teacher's aide.[20]

A person serving in an instructional position that does not require certification does not accumulate probationary service credit in that position. It has been held in *Kellerman v. Bay City Public Schools*[21] that because adult education teachers are not required to be certified, they do not acquire tenure.

Part-Time Service

Service in part-time positions will count toward fulfillment of the probationary period. In *Hughes v. Bullock Creek School District*,[22] the teacher claiming tenure taught half-days throughout two school years. The teacher was engaged in teaching for all of the required 180 days of student instruction. In holding that the teacher had acquired tenure, the Commission stated:

> [T]here is nothing in the Act that would require the teacher to teach every day or every hour of the day taught. It is conceivable that specific subjects within the curriculum may require fewer hours of teaching at the discretion of the school authorities. . . . The Appellant was regularly employed to teach a given number of subjects for a specific number of days per month over a period of two years. . . . The Commission concludes

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[20] Cook v. Sturgis Public Schs., 144 Mich. App. 427, 430, 375 N.W.2d 740, 742 (1984).

[21] TTC 78-50-R. In Kellerman v. Bay City Schs., 141 Mich. App. 276, 367 N.W.2d 371 (1985), the Court held that because adult education teachers in Bay City were not employed for the full school year of 180 days as defined in MCLA 380.1284, MSA 15.41284, they did not meet the definition of teacher and acquire tenure under the Act. The Court did not address the certification issue.

[22] TTC 72-9.

> that there is nothing in the statute that prevents the Appellant or any similar teacher so employed from attaining tenure status at the close of two school years.[23]

The Commission's decision was affirmed by the Circuit Court in *Bullock Creek School District v. Michigan Teacher Tenure Commission*.[24] The Court stated that the question before it was:

> Can a part-time teacher gain tenure status upon completion of two years in a probationary status, or must the teacher, because of the fact that she was working under a half-time contract with half-pay complete four full years of probation?[25]

The Court held that two years of part-time service at half-pay constituted two probationary years.

The Commission's decision in *Kellerman v. Bay City Public Schools*,[26] while reversed for other reasons, provides some indication of how the Commission would rule on the question of counting days served in education programs requiring less than 180 days of instruction. In *Kellerman* the adult education program consisted of two semesters of sixteen weeks each. The appellants' teaching assignments varied from as little as three hours up to twenty-four hours of instruction each week.The Bay City Board had determined that the adult education program did not require 180 days of instruction. The appellants had provided instruction throughout the academic year, as the year was defined by the school board, for the adult education curriculum. Each had been assigned to teach, on a continuing basis, certain specified classes that met for a predetermined number of hours. The Commission concluded that employment as a teacher in an adult education program can be sufficient to qualify an individual for tenured status. (The Commission later determined that adult education teachers are not entitled to the protection of the Tenure Act because they are not required to be certified.)[27]

Miscellaneous Service

Teaching service in other states, in nonpublic schools, or in state institutions of higher education will not fulfill any portion of the probationary period requirement.[28]

Any teacher who has previously taught in a Michigan school district and failed to achieve tenure must serve a two-year probationary period when employed in another district. Probationary service credit is not transferable from one district to another.

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[23] Id. at 4.

[24] No. 4102, Circuit Court, Ingham County (June 20, 1974).

[25] Id. at 2.

[26] TTC 78-50.

[27] Kellerman v. Bay City Public Schs., TTC 78-50-R.

[28] 1975-76, p. 459, OAG No. 4976, (May 14, 1976).

The Michigan Teachers' Tenure Act grants tenure after two years of satisfactory service. The Attorney General has stated, however, that the statute does not require the two probationay years to be consecutive.[29] More recently, the Court in *Cadillac Public Schools v. Ward* stated, "There is nothing in the statute, MCL 38.81; MSA 15.1981, that required that the two-year period be continuous or unbroken."[30]

It is doubtful that a teacher could resign his position after one year of service, teach in another district, then return to the district where he first taught and successfully claim that his first year of employment fulfilled part of his probationary period.

Probationary service earned entirely in the same school district, but interrupted by military service, a leave of absence, or a period of layoff where the teacher is not employed by another school district could probably be counted.

Occasionally, after a teacher completes a satisfactory probationary period and is eligible to achieve tenure, he resigns and accepts a position in another school district. There are no decisions on whether the teacher should be required to complete a two-year probationary period in the new district or is eligible for immediate tenure status.

If a teacher has completed two years of satisfactory service and is laid off, he is eligible for tenure in that district.

It is clear that if a teacher's two-year probationary period has been unsatisfactory and his contract has not been renewed, he cannot transfer to another district and be eligible for tenure; he must serve a complete two-year probationary period in the new district.

A teacher and board of education cannot contract to shorten the probationary period to less than two years.[31] Nor can tenure be achieved by serving only parts of two separate years. A teacher hired for a portion of one school year and then rehired for a second year does not complete the mandatory two-year probationary period and achieve tenure.[32]

Irregular or Non-Standard Service

Is irregular or non-standard service of sufficient duration and continuity to constitute completion of the two-year probationary service mandated by the Teachers' Tenure Act? In this section, three types of irregular service are discussed: 1) teachers employed midyear; 2) teachers employed in regular positions for substantial but irregular lengths of time; and 3) teachers who are absent for a few days during the school year.

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[29] 1949-50, p. 503, OAG No. 1126 (March 17, 1950).

[30] 134 Mich App 800, 814, 351 N.W.2d 873, 874 (1984).

[31] Ellis v. Wakefield Tp. Sch. Dist., 79 Mich. App. 347, 261 N.W.2d 320 (1977).

[32] Kellerman v. Bay City Schs., 141 Mich. App. 276, 367 N.W.2d 371 (1985); Davis v. Harrison Community Schs., TTC 79-56.

A. Midyear Employment

The phrase "full school year" found in MCLA 38.71; MSA 15.1971, is not a clear, definite statement. For this reason, there is a need for a way of computing the two-year probationary period that can be easily applied and that will yield fairly predictable results.

For probationary teachers who are employed to start teaching at the beginning of the school year on a one-year contract, defining the first probationary year is generally quite simple. It is the same as the school year. But school boards often employ teachers to commence work at times other than the opening day of school. For these teacher employed midyear, the probationary years are computed differently. Since 1950, the Tenure Commission has consistently held that teachers who do not begin their employment at the beginning of the school year do not complete a full school year until the *anniversary date* of their employment.[33] For these teachers the probationary period begins with the initial date of employment and continues for two years; it is completed on the second anniversary of the date of employment.(This method of computation is called "anniversary date"). For example, if a new teacher was employed to begin teaching on February 1, 1985, his first year of probation service ends January 31, 1986. His second year of probation starts February 1, 1986, and ends January 31, 1987.

An opinion of the Attorney General supports this method of computing the two years of probationary service for teachers employed at irregular times:

> It is our opinion that the completion of an equivalent of two complete school years of service, not necessarily calendar years, is prerequisite to tenure under the Michigan Teacher Tenure Act. . . .
>
> . . . .
>
> While the Tenure Act, Article II, does not make express provision for credit of fractions of school years toward the completion of the two year probationary period of a beginning teacher, neither does the act expressly require the completion of the two complete, consecutive and regular school years. The probationary period implies that a beginning teacher is "on trial" during the *first* two years of employment in respect to his being granted tenure. This is the prescribed length of time given to the board within which to determine the teacher's fitness and capabilities and to decide whether he merits continuous tenure in the district. We think that the period should not be extended through interpretation beyond the statutory requirement.
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> In view of this situation, it is our opinion that the teacher in question who was employed on December 1, 1947, would have completed the two probationary school years of service on December 1, 1949.[34]

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[33] Breuhan v. Plymouth Canton Community Schs., TTC 81-66; Hines v. Unionville-Sebewaing Area Schs., TTC 81-36; Davis v. Harrison Community Schs., TTC 79-56; Ward v. Cadillac Area Schs., TTC 79-16; Cook v. Sturgis Public Schs., TTC 77-13; Cavalier v. Warren Woods Bd. of Educ., TTC 70-18.

[34] 1949-50, p. 503-504, OAG No. 1126 (March 17, 1950).

Even though the Tenure Commission has held in accordance with this opinion, the "anniversary date" method has generated a considerable amount of litigation. In *Cavalier v. Warren Woods Board of Education*,[35] the Commission held that a teacher's probationary period began to run on January 29, 1968 and ended two years later on January 29, 1970.' In *Cook v. Sturgis Public Schools*,[36] the Commission held that a teacher's probationary period began to run on March 3, 1975 and ended on March 3, 1977.

In *Hines v. Unionville-Sebewaing Area Schools*,[37] the two-year probationary period began on October 5, 1977, the first day of the teacher's employment and was completed on October 5, 1979. In *Davis v. Harrison Community Schools*,[38] the Commission held that a teacher's two-year probationary period began to run on January 24, 1977 and ended on January 24, 1979.

The Commission's decision in *Davis* best illustrates the "anniversary date" controversy. In *Davis*, the board contended that the Tenure Act was amended in 1967 for the purpose of requiring that the probationary period begin on the first day of the school year. The amended language that is pertinent is:

> The term "teacher" as used in this act shall include all certificated persons employed *for a full school year* by any board of education or controlling board of any public education institution.[39]

In *Davis* the board argued that the probationary period does not begin to run until the teacher is employed for a full school year, beginning in September and ending in June, and that the 1967 amendment defined the probationary year—employment from the beginning of the school year. The board also contended that the amendment was a criticism of Tenure Commission decisions that affirmed the anniversary date rationale: *Cook v. Sturgis Public Schools*,[40] and *Ward v. Cadillac Area Schools*.[41]

The board argued that the inclusion by the legislature of the phrase "full school year" in the definition of the term "teacher" mandated a reversal of the anniversary date decisions.It asserted that the phrase was added to prevent two hardships caused by the anniversary date computation; First, starting the probationary period concurrent with the start of the school year avoids the possibility of midterm terminations that disrupt the educational continuity needed in the classroom. Second, it protects the probationary teacher who could be placed in the classroom midyear and be subject to evaluation before achieving mastery over the classroom.[42]

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[35] TTC 70-80.

[36] TTC 77-13 *aff'd*, Cook v. Sturgis Public Schs., 144 Mich. App. 427, 375 N.W.2d 740 (1984).

[37] TTC 81-36, *aff'd*, Unionville-Sebewaing Bd. of Educ. v. Hines, Mich. App. No. 71219 (unpublished *per curiam* opinion 1984).

[38] TTC 79-56, *aff'd*, Davis v. Harrison Community Schs., 126 Mich. App. 89, 342 N.W.2d 528 (1983).

[39] MCLA 38.71, MSA 15.1971, *as amended* by Act 216 of July 10, 1967 (the amended language is emphasized).

[40] TTC 77-13, *aff'd*, 144 Mich. App. 427, 375 N.W.2d 740 (1984).

[41] TTC 79-16, *aff'd*, 134 Mich. App. 811, 351 N.W.2d 873 (1984).

The Commission rejected the "educational continuity" argument because the legislature did not amend MCLA 39.92, MSA 15.1992, that provides for tenured teachers transferring in midyear from other districts, when it amended MCLA 38.71, MSA 15.1971. Under the board's interpretation, these teachers, would be required to serve more than one year in order to earn one year of probation. The legislature's failure to change MCLA 39.92, MSA 15.1992, the Commission held, belies the rationale proffered by the board to justify its interpretation. The Commission also rejected the board's argument that the anniversary date method does not sufficiently protect probationary teachers.[43]

The Commission determined that the purpose of the "full school year" language was to protect against attempts to circumvent the required two-year probationary period.The amendatory language clarifies the legislature's requirement and establishes that a probationary teacher must serve two complete years in the district to gain tenure. The language excludes an interpretation that would have allowed a premature grant of tenured status or required that a teacher serve a period longer than two years.

The Commission held that the anniversary date method extends the evaluation time of the irregularly employed probationary teacher to sixty days before the end of his anniversary date. This assures midyear hires a full year to adjust to the rigors of teaching and affords the board a full year to review the service provided.[44]

The Commission's decision in *Davis* has been affirmed by the Michigan Court of Appeals, that stated:

> [T]his court is convinced that the tenure commission was correct in adopting the anniversary date method of computing defendant's period of probation.
>
> Plaintiff contends that the only logical purpose for the 1967 amendment to Art I, sec 1, was to limit the statutory definition of "teacher" to those individuals employed at the beginning of the school year. While we find this to be a reasonable interpretation, we are persuaded that such was not the Legislature's intent. We reject that interpretation primarily because its effect would be to require hundreds, perhaps thousands, of teachers to routinely serve more than two years of probation, thus conflicting with Art II, sec 1, MCL 38.81; MSA 15.1981. See also *Wilson v Flint Bd of Ed. supra*. Individuals who begin teaching on the second day of the school year and any time thereafter would be given no credit against their two-year probationary period. In the absence of a clear legislative intent, we decline to so extend the mandatory period of probation. We

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[42] Davis v. Harrison Community Schs., TTC 79-50.

[43] As initially adopted, MCLA 38.71, MSA 15.1971, defines teacher as "all certificated persons employed by an board of education or controlling board of any public educational institution." The provision was amended by 1967 PA 216 and now defines teacher as "all certificated persons employed *for a full school year* by an board of education or controlling board of any public educational institution" (emphasis added).

[44] Davis v. Harrison Community Schs., TTC 79-50.

> agree with the tenure commission that such a construction would open the door to a great abuse in the hiring and discharging of new teachers, a practice which the act was designed to cure.
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> . . . .
>
> We find that the amendment was intended to make clear that a teacher is required to serve two full school years of probation rather than portions of two separate school years. Prior to the amendment, a teacher hired for part of a school year and hired for the following year could have claimed tenure based on service during two school years. The amendment forecloses any attempt to assert tenure based on less than two full school years of employment. . . .We conclude that defendant's period of probation began on January 24, 1977, and ended on January 23, 1979.[45]

B. Interrupted Service.

One issue is whether a probationary year can be considered completed despite a hiatus in the middle of the year. Two decisions describe this problem. In *Gladstone v. Highland Park Board of Education*,[46] the Commission determined that a probationary teacher's use of 63 consecutive sick days did not interrupt his probationary service, because the number of sick days used did not exceed number his contract allowed.

In *Stakoe v. Mackinac Island Public Schools*,[47] the issue was whether a maternity leave requested by the teacher constituted a break in service that interrupted the statutorily required two-year probationary period. The Commission concluded that it did, for two reasons: 1) Although the Tenure Act specifically provides for leaves of absence for tenured teachers and does not allow such leaves to terminate continuing tenure that was previously acquired,[48] it does not provide for leaves of absence for probationary teachers. (This indicates a legislative intent not to protect probationary teachers rights by permitting leaves of absence). 2) The two-year probationary period cannot be shortened.[49] Thus, the maternity leave that interrupted the statutorily mandated two-year probationary period was not service that contributed toward probation.

C. The "All but a Few Days" Exception

Sometimes teachers serve nearly but not quite all of the school year. The question arose as to the number of days that are required to complete a full school year. In *Blurton v. Bloomfield Board of Education*[50] the Court held that because the probationary teacher taught every day except three midyear days and some permissible sick and leave days, he substantially completed one year of probationary service. *Blurton* did not involve time missed because of a late starting date, but rather days missed in the middle of the school year.

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[45] Davis v. Harrison Community Schs., 126 Mich. App. 89, 96-97, 342 N.W.2d 528, 531-32 (1984).

[46] TTC 80-14.

[47] TTC 81-65.

[48] MCLA 38.112, MSA 15.2012.

[49] Ellis v. Wakefield Tp. Sch. Dist., 79 Mich. App. 347, 261 N.W.2d 320 (1977). The Tenure Act precludes the acquisition of tenure prior to the expiration of the two-year probationary period.

[50] 60 Mich. App. 741, 231 N.W.2d 535 (1975).

The board claimed that Blurton had not worked a full school year and thus did not fall within the protections of the Tenure Act. In rejecting the board's claim, the Court stated that it did not believe "the Legislature intended to exclude from the tenure act's coverage a person who taught on a full-time basis for a whole school year except for a few days."[51] *Blurton*, however, does not apply to teachers whose employment begins several weeks after the school year has commenced. For example, in *Hunter v. South Lyon Community Schools*,[52] the teacher argued that the *Blurton* "few days" exception should apply. His employment commenced on October, 4, 1978, and he argued that his probationary year should run from the beginning of the school year. The Commission rejected the argument, stating:

> We interpret *Blurton* to stand for the limited proposition that a board may not deny tenure to a teacher who has provided two years of service, by a showing that the teacher was absent for a limited period of time, and therefore, the teacher does not fall with the score of the Act.[53]

Consistent with its decision in *Huntor*, the Commission held in *Ward v. Cadillac Area Public Schools*[54] that the time between the beginning of the 1977-78 school year, and November 24, 1977, cannot be counted as part of the teacher's probationary period when the teacher did not teach during that period.

The substantial completion formula in *Blurton*, however, did not apply to a teacher who had completed more than 180 days. In *Breuhan v. Plymouth-Canton Community Schools*,[55] the Commission held that a teacher who began his employment on October 3, 1979, had completed his first full probationary year on October 2, 1980. Breuhan argued that he had substantially completed the full probationary year at the end of the 1979-80 school year because he had worked a total of 180 days—he had fulfilled his 170 day contract and worked 10 additional days after the close of the regular school year. The Commission held that even though Breuhan's total days of service during that school year were only seven less than the number of days of the regularly contracted school year, his probationary period would not be completed until the anniversary date of his employment i.e., October 2, 1981.

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[51] Id. at 744, 231 N.W.2d at 537.

[52] TTC 79-14.

[53] Id. at 4.

[54] TTC 79-16.

[55] TTC 81-66.

The Commission rejected the argument that a teacher needs only to "substantially complete" a full school year of probationary employment. The Commission opined that *Blurton* does not establish a substantial completion test but merely provides an exception where a teacher has been absent for a very short period of time.

However, the Court of Appeals reversed the Commission's decision by holding that Breuhan had completed the required two years.[56] The Court stated:

> In *Blurton v. Bloomfield Hills Board of Education* the teacher had taught the full year except for three days at the beginning of the second semester of school.In finding that the teacher's substantial compliance with the requirement that she teach a full school year was sufficient, this Court held that a literal interpretation of the phrase "a full school year" would frustrate the Legislature's purpose behind the tenure act. This Court's primary concern was that to hold otherwise would allow a school board to circumvent the notice provision of the tenure act by hiring a teacher a few days after the school year began. It should be noted, however, that the "anniversary date" method of computing the two-year probationary period had not been approved by this Court at the time *Blurton* was decided.
>
> We read *Blurton* to mean that less than 187 days of teaching can qualify as a full school within the meaning of the tenure act. What we next must determine is over what period the substantial compliance must occur, i.e., the regular school year or the "anniversary date" school year. . . .If the period of time the teacher has taught is sufficient for the school district to determine the competence of the teacher, the purpose of the two full school year provision is then met.[57]
>
> Breuhan began his employment with Plymouth-Canton Schools some 17 days after the beginning of the school year. He worked an additional 10 days at the end of the school year. The following year, Breuhan taught the complete year. We conclude that Plymouth-Canton Schools had adequate time to evaluate Breuhan's teaching performance and, thus, Breuhan completed the probationary period on August 26, 1981, his last day of teaching under the contract. The failure of Plymouth-Canton Schools to inform Breuhan that his teaching was unsatisfactory resulted in Breuhan's achieving tenured status on that date.[58]

In a dissenting opinion in *Breuhan*, Justice MacKenzie stated:

> I would hold that the threshold requirement is that the two-year anniversary-date test be met, and that "substantial compliance" is an issue only where, although the teacher satisfies the anniversary-date test, there was some hiatus in employment during the course of the two-year period. . . . While an exception to the two-year anniversary-date requirement might properly be made where it is shown that the school district in bad faith and without legitimate reason delayed hiring until after the start of the school year in an apparent attempt to evade its obligations under the teacher tenure act, plaintiff herein has made no such claim of bad faith.[59]

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[56] Breuhan v. Plymouth-Canton Community Schools, 137 Mich. App. 813, 359 N.W.2d 566, (1984).

[57] Id. at 818-19, 359 N.W.2d at 569.

[58] Id. at 819-20, 359 N.W.2d at 569-570.

[59] Id. at 820-21, 359 N.W.2d at 570.

When *Breuhan* was appealed to the Supreme Court,[60] a majority adopted the Commission's anniversary-date formula. Since Breuhan began his employment on October 3, 1979, he could not complete his first full year until October 2, 1980, and his second year until October 2, 1981. In the Supreme Court's view the anniversary date method of computation of a probationary year will produce the most consistent and workable result.

Third Year of Probation

A third year of probation may be granted to a probationary teacher upon completion of two years of probation. The Tenure Act provides:

> No teacher shall be required to serve more than 1 probationary period in 1 school district or institution: Provided, That a third year of probation may be granted by the controlling board upon notice to the tenure commission.[61]

The third year of probation was established for the teacher who has not satisfied the board sufficiently to warrant granting of tenure. The third year of probation extends the "trial period" from two to three years and is considered to be for the benefit of the teacher.

Granting a teacher a third year of probation is not a final decision, nor is it equivalent to termination. It only continues the period of trial. The statutory procedural requirements for discontinuance of service do not apply to an extension of the two-year probationary period to three years. It is not necessary for a board to provide reasons for the third year. Questions regarding third-year probation issues may be appealed to the Tenure Commission.[62]

The question has been raised as to whether a board of education may ever require a teacher to serve a third year of probation, since the language in the statute uses the word "grant," which implies that the third year of probation must be requested by the teacher.[63] It is doubtful that the legislature intended that teachers could be placed on a third year of probation only if they submitted the request to the school board.

The Michigan Supreme Court held that a board has authority to require a teacher to serve a third year of service in the district on a probationary status if the teacher decides to continue his employment in the district.[64] Under this interpretation, a board of education would state to the teacher, in effect: "You have completed two years of probationary service in the district. We are not fully satisfied with your work, but we believe you show promise of becoming a good teacher. Therefore, we are requiring you to serve a third year of probationary service rather than granting you tenure at this time." This interpretation more adequately expresses the meaning of the Act.

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[60] Breuhan v. Plymouth-Canton Community Schs., Mich., NW.2d(1986).
[61] MCLA 38.82, MSA 15.1982.
[62] Slocum v. Littlefield Bd. of Educ., 127 Mich. App. 183, 338 N.W. 2d 907 (1983).
[63] Wilson v Flint Board of Education, 361 Mich 691; 106 N.W.2d 136 (1960).
[64] Amato v. Oxford Area Schs., 402 Mich 521, 266 N.W.2d 445 (1978).

A board of education cannot by policy require all probationary teachers to serve a third year. This matter was settled by the Michigan Supreme Court in *Wilson v. Flint Board of Education*.[65] In April 1954, the Flint Board adopted a policy requiring three years of probation for *all* new teachers in the school system. Early in 1958, Wilson and all other second-year probationary teachers were placed on third year probation. The Tenure Commission was so notified. A year later, on March 12, 1959, the superintendent informed Wilson that he "could not conscientiously recommend (her) for a tenure contract." On March 24 she was notified of her discharge, effective June 12, 1959, at the end of the third year of the probationary period prescribed by the board.

On appeal, the Supreme Court noted that the basic question to be resolved was whether the teacher was tenured and entitled to the procedural safeguards of the Act prior to dismissal. To settle the issue it was necessary for the Court to decide whether or not a controlling board could require all teachers to serve a third year of probation. On this issue the court stated:

> We have made reference heretofore to the "policy" of the board to "require" 3 years of probation for a beginning teacher. But the State, also, has a policy as to beginning teachers expressed in the teachers' tenure act. That policy is that the probationary period shall be not 3 years but 2. "No teacher," says the statute, "shall be required to serve more than 1 probationary period," such period having been heretofore defined as 2 years' duration. It is true that a board may "grant" a third year of probation to a teacher, but the language of the grant (as opposed to that of a requirement) makes clear that the third year is for the benefit of the teacher, who may not have satisfied the board fully but who may have shown promise nonetheless. Nowhere in such language is there any foundation for saying that a board may require, in all cases, 3 years of probation. . . .[66]

The Attorney General[67] has also interpreted *Wilson* as prohibiting a controlling board from placing a teacher on a third year of probation at the inception of probationary employment.

Procedures

The procedures necessary for placing a teacher on a third year of probation are summarized as follows: As a general rule, the school board must make this decision at a public meeting[68] and must send the necessary notice to the Tenure Commission.[69] There is no requirement that a board state the specific reasons for its actions in extending probation.[70] The notice must be given to the Commission at some time prior to the end of the teacher's second year of probation.[71] The board is not required to inform the teacher of its action.[72]

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[65] 361 Mich 691, 106 N.W.2d 136 (1960).
[66] Id. at 695-96, 106 N.W.2d at 138.
[67] 1960, p. 157, OAG No. 3467 (December 19, 1960).
[68] Andersen v. Adrian Bd. of Educ., 73 Mich App 33, 250 N.W. 2d 786 (1976).
[69] MCLA 38.82, MSA 15.1982.

A. *Notice to the Commission*

Notice to the Commission of a teacher's placement on a third year of probation is mandatory and is a condition precedent to the effective granting of that probationary year. If a controlling board of education fails to properly notify the Commission, the placement will be ineffective and the teacher will become tenured upon completion of his second year of probation.[73]

The notice to the Tenure Commission serves a useful purpose; it is not a frivolous act that exalts form over substance. School districts have argued that no prejudice results from failure to provide notice to the Commission. Teachers assert that the notice to the Commission is necessary because it serves as a deterrent against over use of the extension of the probationary period beyond the two years normally required, and because the granting of a third year of probation is an unusual and extraordinary situation. In establishing reasons for the notice the Commission stated:

> [B]y mandating this notice requirement, [the legislature] has specified the only method by which a controlling board may provide conclusive evidence that a teacher who would ordinarily be a tenured teacher is, in fact, a probationary teacher over whom the State Tenure Commission has no jurisdiction. Accordingly, we conclude that appellee's second defense, that the failure to provide notice to this Commission is not prejudicial and that the notice requirement is without purpose, cannot be sustained.[74]

And in *Slocum v. Littlefield Public Schools* the Commission said:

> We find that the notice to this Commission is the means by which one may distinguish between a third year probationary teacher and a first year tenured teacher. By mandating this notice requirement, the legislature has specified the only means by which a controlling board may provide conclusive evidence that a teacher who would ordinarily be a tenure teacher is, in fact, a probationary teacher over whose claims this Commission is without jurisdiction.[75]

Slocum also argued that the board never formally authorized or directed its counsel to notify the Commission of her third year of probation. Thus, she claimed, the notice provided by counsel was inadequate. The Commission held that the notice was sufficient because counsel had been involved in the prior arbitration hearing and in a prior appeal to the Commission. The Court of Appeals affirmed the Commission on this point, stating:

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[70] Andersen v. Adrian Bd. of Educ., 73 Mich App 33, 250 N.W. 2d 786 (1976).

[71] Davis v. Harrison Community Sch., 126 Mich. App. 84, 342 N.W.2d 529 (1983).

[72] Slocum v. Littlefield Bd. of Educ., 127 Mich. App. 183, 338 N.W.2d 907, 913 (1983).

[73] Zielinski v. Saranac Community Schs., TTC 71-14; Gross v. Woodhaven Public Schs., TTC 71-15 and 71-16; 1957, p. 337, OAG No. 2992 (August 12. 1957); 1958, p. 265, OAG No. 3297 (Oct. 15, 1958).

[74] Ward v. Bd. of Educ., TTC 79-16, *aff'd*, Cadillac Public Schs., 134 Mich. App 811, 351 N.W.2d 873 (1984).

[75] TTC 73-8-2 at 5.

> The purposes for which a school board may employ an attorney are set forth by statute. A school board is authorized to employ an attorney to represent the school district or board in action brought for or against the district and to render other legal service for the welfare of the school district. MCL 380.1253; MSA 15.41253.
>
> The attorney's action in this case was necessary to promote the interests of the school board in its controversy with petitioner. The board, which sought to discharge the petitioner after two years of probation, clearly did not wish her to secure a tenured status. The board could avoid this result only by notifying the commission of the extension of the petitioner's probation. Thus, by providing such notice, respondent's attorney did what was necessary to carry out the purpose of his agency. We conclude that the respondent's attorney had the implied power to so notify the commission.[76]

The Commission also held that the failure of the board to provide Slocum with a copy of the attorney's letter to the Commission did not render the notice insufficient. The Commission stated:

> The Michigan Supreme Court dealt with a similar contention in *Amato v. Oxford Area Community School District*, 402 Mich 521 (1978). There the teacher claimed that the school board's failure to provide notice of unsatisfactory service, pursuant to Article II, Section 3, when granting her a third year of probation under Article II, Section 2, caused her to gain tenure by operation of law. The majority obviously approved of the school district's action in notifying the teacher, and in formally telling her the basis for its decision. Nevertheless, the majority held that the two disputed sections of the Act must be construed and applied separately. In so doing, the majority implicitly rejected Justice Moody's argument that the two sections should both apply in these situations because separate construction would allow school boards to place a teacher on a third year of probation without his or her knowledge. Rather, the majority suggested that the failure to provide a reason for placement on a third year of probation was merely indicative of a policy which contravenes the statutory purpose of a third year of probation under *Wilson v. Flint Board of Education*, 361 Mich 691 (1960). Accordingly, we conclude that the failure to provide appellant with a copy of counsel's letter is not a basis for vitiating the notice.[77]

The Court of Appeals affirmed the Commission on this point.[78] The Tenure Act does not require the controlling board of education to notify the teacher of the decision to extend his probationary period.

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[76] Slocum v. Littlefield Bd. of Educ., 127 Mich. App. 183, 194-95, 338 N.W. 2d 907 (1983).
[77] Slocum v. Littlefield Public Schs., TTC 78-8-2 at 7.
[78] Slocum v. Littlefield Bd. of Educ., 127 Mich. App. 183, 194-95, 338 N.W. 2d 907 (1983).

Placement on a third year of probation is not the equivalent of termination of services; thus, notice of unsatisfactory service is not required. In *Amato v. Oxford Area Schools*,[79] the Michigan Supreme Court declined to hold the board responsible for formally designating that the work was "unsatisfactory," or even to hold that sixty-day notice was required for a third year of probation. The following is the summary statement of the Court's ruling:

> The sections of the teacher tenure act controlling the granting of a third year of probation and the discontinuance of the services of a probationary teacher must be read separately. The former is directed towards a continuance of service, the latter towards a discontinuance of service. To add the statutory procedural requirements for the discontinuance of a probationary teacher to those which apply to an extension of a probationary period would require straining out of the context the plain words of the statutes. The Court cannot attribute to the Legislature a meaning inconsistent with the act's purpose, which is to grant a third year of probation upon a decision by the board of education that a teacher's work is not entirely satisfactory but that there has been demonstrated some reason to believe that the teacher could improve.[80]

Justice Williams dissented in *Amato*, holding that the sections of the Tenure Act controlling the granting of a third year of probation and the discontinuance of a probationary teacher's service must be interpreted so as to give meaning to both, if at all possible.[81] Justice Williams stated:

> The written notice which must be given to the teacher. . . .performs two functions. . . .The first is to give time to the teacher to consider how best to implement his or her career plans. The second is to inform the teacher as to the character of the teacher's work, so that the teacher will be able to make his or her services acceptable and productive.[82]

It is imperative that a board of education notify the Tenure Commission that a teacher is being placed on third year probation.

For the placement on a third year of probation to be effective, the notice must be filed with the Commission on or before the end of the second year of probation. Failure to provide the Commission with timely notice of that action results in the teacher achieving tenure. In *Amato* the Court cited an Attorney General's Opinion that states:

> In the absence of notification in accordance with the statute, a teacher engaged in the second year of employment would have tenure under the act and continuous employ-

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[79] 402 Mich. 521, 266 N.W.2d 445 (1978). *Accord*, Bush v. Cheboygan Area Schs., TTC 80-12.

[80] 402 Mich. 521, 266 N.W.2d 445 (1978) (headnote).

[81] 402 Mich. 521, 536, 266 N.W.2d 445, 450 (1978).

[82] Id. at 536, 266 N.W.2d at 450. In Peeples v. Highland Park Bd. of Educ., TTC 82-58 at 4, the Commission stated:

> While notice of unsatisfactory service must occur at least 60 days prior to the close of the probationary period, placement on a third year of probation is timely if taken at any time prior to the completion of the two-year probationary period.

ment at the completion of the second year, provided that the controlling board does not require a third year of probation by giving notice to the tenure commission under the act.[83]

This opinion affirms an earlier opinion of the Attorney General which concluded that notice to the Commission of the placement on a third year of probation is a condition precedent to such action:

> The language of section 2 is clear. Its purpose is that no teacher can be required to serve more than one two-year probationary period, as established in section 1, with the proviso that a controlling board may require a third year of probation upon notice to the Tenure Commission. That is, the controlling board must give notice to the Tenure Commission as a condition precedent to requiring the third year of probation. Unless such notice is given, the act provides that the teacher shall have tenure after serving the two-year probationary period established in section 1.
>
> It is therefore my opinion that the notice referred to in section 2 is mandatory, and that without it no third year of probation can be required of any teacher in a tenure district.[84]

In *Davis v. Harrison Community Schools*[85] the court ruled that a teacher was not properly placed on a third year of probation. The board made the decision prior to the close of the teacher's second year of probation but failed to notify the Commission until after the close of that year. Because the third year of probation does not become effective until notice is given to the Commission under the Act, the board's action was ineffective.[86]

In *Hines v. Unionville-Sebewaing Area Schools*,[87] the Board did not notify the Tenure Commission of its decision to place the teacher on a third year of probation until almost two years after the decision was to be effective. The Commission determined that the board's failure to notify the Commission prior to placing Hines on a third year of probation rendered such placement ineffective.

B. Legal Principles for Third Year Probation

1. A board of education cannot, as a policy, require all teachers to serve a third year of probation.
2. A board of education must make the decision to place a probationary teacher on a third year at some time prior to the end of the teacher's second probationary year.

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[83] 1957-58, p. 265, OAG No. 3297 (Oct. 15, 1958), cited in 402 Mich. at 527, 266 N.W.2d at 446.

[84] 1957, p. 377, OAG No. 2992 (Aug. 12, 1957).

[85] 126 Mich. App. 89, 342 N.W.2d 528 (1983).

[86] Late notice to the Commission has sometimes been due to failure of the board to correctly calculate probationary time. Cadillac Public Schs., v. Ward, 134 Mich. App. 811, 351 N.W.2d 873 (1984); Peeples v. Highland Park Bd. of Educ., TTC 82-58.

[87] TTC 81-36, *aff'd*, Unionville-Sebewaing Area Schs. v. Hines, Mich. App. No. 71219 (Unpublished *per Curiam* opinion, 1979).

3. A school board is not required to provide the teacher with a notice of unsatisfactory service as a condition to placement on a third year of probation.
4. A board of education is required to notify the Tenure Commission in writing that a teacher is being placed on a third year of probation. The board is not required to give the teacher a copy of the notice. Failure to provide the notice to the Tenure Commission is not harmless error.
5. The notice to the Tenure Commission must be given prior to the close of the teacher's second probationary year.
6. It is not necessary for a board to provide reasons for extending the probationary period to three years.
7. The statutory procedural requirements for discontinuance of service do not apply to an extension of the probationary period to three years.
8. A board's decision to extend the probationary period to a third year must be made at a public meeting.

Notice of Nonrenewal of Probationary Teacher

When a controlling board of education terminates a probationary teacher, it must give notice that meets the Act's adequacy criteria. Four issues are involved in determining whether the notice is legally sufficient: 1) Did the board provide the teacher with a definite written statement of unsatisfactory service? 2) Did the board provide the teacher with a statement of the teacher's right of appeal to the Tenure Commission? 3) Did the board comply with the time requirements of the Act for giving notice of nonrenewal? and, 4) Did the board actually deliver the notice?

Sufficiency of Written Statement of Unsatisfactory Service

If it decides not to reemploy a probationary teacher, the "controlling board shall provide the probationary teacher with a definite written statement as to whether or not his work has been satisfactory."[illegible] The Michigan courts have had some difficulty interpreting this statutory requirement. Several court and Tenure Commission decisions serve to clarify it.

The legislature did not intend to permit the arbitrary dismissal of probationary teachers. Therefore the sixty days' notice of non-reemployment cannot be used without cause; it must be related to the quality of the teacher's services. If the controlling board could dismiss a probationary teacher arbitrarily, with no consideration of quality, it could prevent any teacher, even one evaluated as satisfactory, from acquiring tenure simply by giving sixty days' notice.

[illegible] MCLA 38.83, MSA 15.1983.

The question in *Munro v. Elk Rapids Schools*,[89] was whether a statement of unsatisfactory work upon discharge was absolutely mandated by statute, or whether a school board under certain circumstances could discharge a probationary teacher even if his work was good. Munro was employed as a probationary teacher. In November and January of his second year, he was evaluated and was rated satisfactory. In February, he received a letter informing him that he would not be offered a contract for the next school year. The school board admitted that the Munro's work was acceptable, but claimed that a "satisfactory" rating does not automatically guarantee continued employment. The Court of Appeals[90] adopted the school board's interpretation, and the Supreme Court affirmed.[91] However, Justice Kavanaugh dissented, holding that the absence of the mandated written notice of unsatisfactory service precluded the board from discontinuing Munro's employment. Kavanaugh emphasized that it was necessary for the school board to follow the letter of the law.

One year later, *Munro* was reargued, and the Michigan Supreme Court adopted Justice Kavanaugh's dissent, stating "that under the statute, unless a probationary teacher is notified in writing that his work is unsatisfactory, upon completion of his probationary period is entitled to employment with tenure status with all of its special privileges."[92]

The Supreme Court later referred to its second *Munro* decision in *Weckerly v Mona Shores Board of Education*, stating:

> We have held that if no written statement is provided, the statute requires it "shall be considered as conclusive evidence that the (teacher's) work is satisfactory." We have also held that if the written statement that a contract would not be renewed fails to state whether or not the teacher's work had been satisfactory, the written statement does not meet statutory requirements.[93]

After the decisions in *Munro* and *Weckerly* the question remained as to whether a board was required to spell out the reasons for not reemploying a probationary teacher. In *Lipka v. Brown City Community Schools*,[94] an evenly divided Supreme Court affirmed an Appeals Court decision[95] that a definite written statement concerning the quality of a probationary teacher's work requires a statement of the reasons for the board's conclusion that the teacher's work was unsatisfactory. On rehearing, a Supreme Court majority held that the provisions of the Teacher's Tenure Act requiring the school board to give written notice to probationary teachers of unsatisfactory work does not include a mandate that a statement of reasons accompany that notice. Justice Kavanaugh, writing for the majority, stated:

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[89] Munro v. Elk Rapids Schs., 17 Mich. App. 368, 169 N.W.2d 527 (1967), *aff'd*, 383 Mich. 661, 178 N.W.2d 450 (1970), *rev'd on rehearing* 385 Mich. 618, 189 N.W.2d 224 (1971).

[90] 17 Mich. App. 368, 169 N.W.2d 527 (1969).

[91] 383 Mich. 661, 178 N.W.2d 450 (1969).

[92] 385 Mich. 618, 619-20, 189 N.W.2d 224, 225-26 (1971).

[93] 388 Mich. 731, 734, 202 N.W.2d 777, 778 (1972) citing Wilson v. Flint Bd. of Educ., 361 N.W.2d 691, 105 N.W.2d 136, 138 (1960); *accord* Lipka v. Brown City Schs., 403 Mich. 554, 271 N.W.2d 771 (1978); Simmons v. Marlette Community Schs, 73 Mich. App. 15, 250 N.W.2d 777 (1976); Dryden v. Marcellus Community Schs., 73 Mich. App. 40, 250 N.W.2d 782 (1976), on other grounds *rev'd*, 401 Mich. 76, 257 N.W. 2d 79 (1977).

[94] 399 Mich. 704, 252 N.W.2d 770 (1977).

[95] 59 Mich. App. 175, 229 N.W.2d 362 (1977).

> The Act's provisions, MCL 38.83; MSA 15.1983, that the board give written notice to probationary teachers of unsatisfactory work does not include a mandate that a statement of reasons accompany that notice. I find it unnecessary to read a "reason" requirement into the provision in order to effect the Act's policy.[96]

Therefore, in the notice to the probationary teacher that his work is unsatisfactory, the board of education is not required to list the specific causes for nonrenewal or its unsatisfactory evaluation. A simple, timely, written notification that the teacher's work is unsatisfactory is in compliance with the statute. It is neither arbitrary nor capricious to refuse to reemploy a probationary teacher without giving specific reasons for that decision, other than that his work is unsatisfactory. The very reason for the probationary period is to give the board a chance to evaluate the teacher without making a commitment to rehire him. Had the legislature intended to require that boards of education set forth the details of why the work was unsatisfactory, it could have and would have done so. Other courts have subsequently followed this interpretation.[97]

While not legally required, however, it is the author's recommendation that school boards and administrators state their reasons for nonrenewal. Good practice requires that the judgment of nonrenewal be based on fact and reasoned analysis. This view is supported by the Michigan Court of Appeals:

> Reason for substantial notice plainly exists when a teacher's livelihood and reputation are at issue. Such protection (the notice) is necessary to allow the probationary teacher to prepare and present an adequate defense in a situation where future employment may depend upon challenging an adverse evaluation of competence.[98]

It is not necessary for the board's resolution or the notice letter to the teacher to include the exact words "unsatisfactory service." In *Commert v. Jenison Public Schools* the court held that the decision in *Munro* "does not mean that 'unsatisfactory service' is a magic word that must be used. However the probationary teacher must be given a written notice, the plain meaning of which is that her work is unsatisfactory."[99]

Both the school board's determination of unsatisfactory service, as reflected in its resolution, and the notice to the teacher should reflect the board's decision that the probationary teacher's performance was unsatisfactory. Decisions of the Commission affirm this conclusion. In *Finke v. Redford Union Schools*[100] the board adopted a resolution to terminate a probationary teacher. The teacher received a letter stating that she had been terminated. However, the letter did not contain a definite written statement of whether or not her work was unsatisfactory. The Commission stated:

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[96] 403 Mich. 554, 558, 271 N.W.2d 771, 773 (1978).

[97] Simmons v. Marlette Bd. of Educ., 73 Mich. App. 1, 250 N.W.2d 777 (1976); Dryden v. Marcellus Community Schs., 73 Mich App. 40, 250 N.W.2d 782 (1976).

[98] Boyce v. Royal Oak Bd. of Educ., 76 Mich. App. 526, 531, 257 N.W.2d 153, 156 (1977).

[99] 75 Mich. App. 115, 119, 254 N.W.2d 808, 810 (1977).

[100] TTC 79-28.

> To deny a teacher tenure after the probationary period, it (the board) must timely notify the teacher of unsatisfactory performance. This was not done by the Redford Union Schools. Appellant gained tenure status by operation of law. Her discharge with compliance to Article IV of the Act, MCL 38.101; *et seq.*; MSA 15.2001 *et seq.*, mandates reinstatement.[101]

Similarly, in *Burton v. Center Line Public Schools*,[102] the board's termination letter failed to include a statement of unsatisfactory service, so the teacher was reinstated with back pay. The board argued that Burton knew his termination was for unsatisfactory service. The Commission rejected the board's argument and found that the written notice to Burton was legally insufficient because it did not contain the basis for the Board's action. Therefore Burton obtained tenure status. The Commission maintained that this strict, literal interpretation was not unjust to a controlling board of education.

A controlling board is not required to provide a statement of unsatisfactory service to a probationary teacher whose contract is being terminated for lack of need for their services. In *Boyce v. Royal Oak Board of Education*,[103] the Supreme Court held that the Tenure Act was not applicable to probationary teachers terminated for economic reasons. The purpose served in notifying probationary teachers of whether their services were satisfactory does not apply to such discharges. The purpose of the Act is not to guarantee teachers continuing employment under any circumstances, but rather to protect them from the arbitrary and capricious conduct of school officials. The Court went so far as to conclude that even tenured teachers were not protected by the sixty-day notice requirement if the termination was for economic reasons.

Adequacy of Notice of Right to Appeal

When a local board determines that a probationary teacher's work is unsatisfactory and sends a timely, written notice of its decision, it must also provide the teacher with a notice of his right to appeal the decision to the Tenure Commission. A controlling board may provide the right-of-appeal notice by including a copy of the entire Tenure Act or of only MCLA 38.121, MSA 15.2021.

However, failure to provide notice of appeal rights will not have the same effect as failure to provide timely notice of unsatisfactory service. The latter will result in a grant of a second year of probation to a first-year teacher and tenure to a second- or third-year probationary teacher. Failure to provide notice of right of appeal will result only in the tolling of the appeal period.

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[101] Id. at 7.

[102] TTC 74-13-R.

[103] 407 Mich. 312, 285 N.W.2d 196 (1979); *accord*, Dailey v. Mackinac Island Bd. of Ed., 120 Mich. App. 187, 327 N.W.2d 431 (1982); Steeby v. Highland Park Sch. Dist., 56 Mich. App. 395, 224 N.W.2d 97 (1974).

The teacher may know he has the right to appeal, but actual knowledge of the right is not sufficient; notice must come from the controlling board. In *Graham v. Livonia Public Schools*,[104] the teacher had actual knowledge of his rights when he received a copy of the Tenure Act from the State Department of Education. This knowledge was not sufficient to constitute notice of right of appeal.

The controlling board of education has an obligation to do more than merely include a written notice of appeal rights.The board is required to inform the teacher in writing of the specific decision that is appealable: the nonrenewal. The example below is an inadequate notice of appeal rights.

> This letter is to advise you that at its regular meeting on April 16, 1984, the Board of Education took action to terminate your teaching contract at the end of the current school year. This dismissal action was taken due to your unsatisfactory performance.
>
> I have included with this letter a copy of the Michigan Teacher Tenure Act for your information.[105]

Included with the above letter was a clean copy of the Tenure Act. No mention was made of the teacher's right to appeal the timeliness or legal effect of the notice of unsatisfactory work. The Commission stated:

> We find appellee's notice to appellant did not adequately apprise her of her rights. We are unconvinced that a clean copy of the Act, read in conjunction with the above letter, provided appellant with adequate notice essential for her to know what she could appeal and how long she had to appeal.[106]

The letter should have included the following statement to meet the requirements of the Act:

> You have thirty (30) days from receipt of this letter to appeal the timeliness and legal effect of this decision to terminate your services for unsatisfactory service to the State Teachers' Tenure Commission.

Delivery of Notice

The Teacher's Tenure Act is silent about how notice of nonrenewal should be sent to a probationary teacher. The Michigan Supreme Court has stated: "The written notice could have been hand delivered, mailed by regular mail or mailed as certified or registered mail; any one of these methods would have been acceptable under the statutory language. Certified or registered mail would give the board concise, and ready proof of delivery of the written notice."[107]

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[104] TTC 79-59; *accord*, Savel v. Clintondale Sch. Dist., TTC 74-48.

[105] Garrity v Manchester Community Sch. Dist., TTC 84-32 at 3.

[106] Id.

[107] Weckerly v. Mona Shores Bd. of Educ., 28 Mich. App. 245, 246, 184 N.W.2d 323, 325 (1970), *rev'd on other grounds*, 388 Mich. 731, 202 N.W.2d 777 (1972).

The school district has the burden of proving that it has actually delivered the notice to the teacher within the legally required time limit. Therefore, hand delivery or certified or registered mail delivery are highly recommended in order to ensure that the teacher receives the notice. In one case, a teacher was reinstated with tenure because the school board's nonrenewal notice was mistakenly delivered to his previous address and he never received it.[108]

As stated previously, the actual delivery date, rather than the date of mailing, is controlling in satisfying the statutory requirement of providing written notice sixty days before the close of the school year. In the case of *Weckerly v. Board of Education*,[109] a school board mailed a dismissal notice to one of its probationary teachers by certified mail. The mail carrier attempted to deliver the letter on time, but the teacher was not home, so the carrier left a mail arrival notice. The teacher found the mail arrival notice several days later and picked up the letter at the post office. The Court held that the actual delivery of the letter occured when the teacher picked up the letter at the post office. In this instance, the delivery was found to be too late, and the teacher was reinstated.

The Tenure Commission decision in *Gordon v. Woodhaven Board of Education*[110] provides a good example of the legal principles involved when a teacher attempts to avoid the serving of a legal notice. In *Gordon*, the teacher claimed that the school board's action was improper because he had not been given timely notice of unsatisfactory service as required by the Act. He argued that the Act required actual receipt of the notice, and that since he did not receive the letter he could not have been terminated. The Commission found, however, that Gordon knew that the written notice of unsatisfactory service would be coming and that his actions were taken, in part, with the hope of evading receipt of notice. The Commission cited several sources for its decision.

> A party may not escape the effect of a required written notice by declining to receive it. . .Hence, we hold that by her failure to receive the notice presented to her by the township trustee she did not defeat the effect of such notice. *State ex rel Sights v. Edwards, et al*, 88 NE 2d 763 (Ind 1949).
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> "The applicable principle is fundamental and unquestioned. 'He who prevents a thing from being done may not avail himself of the nonperformance which he has himself occasioned, for the law says to him in, effect: "This is your own act, and therefore you are not damnified." *Dolan v Rodgers*, 149 N.Y. 489, 491, 44 N.E. 167; and *Imperator Realty Co. v. Tull*, 228 N.Y. 447, 457, 127 N.E. 263; quoting *West v Blakeway*, 2 Man. and G., 828, 839. Sometimes the resulting disability has been

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[108] Karabetsos v. Sch. Dist. of East Detroit, 17 Mich. App. 10, 168 N.W.2d 654 (1969). In Arnold v. Crestwood Bd. of Educ., 87 Mich. App. 625, 647, 277 N.W.2d 158, 165, (1979), the Court stated, "[O]ne may not presume that a registered letter which is never claimed was known to be in existence by the addressee" and that "receipt of notice of attempted delivery alone would not establish a rebuttable presumption of notice."

[109] 388 Mich. 731, 202 N.W.2d 777 (1970). The teacher was also notified orally that he would be terminated.

[110] TTC 80-55.

> characterized as an estoppel, sometimes as a waiver. The label counts for little. Enough for present purposes that the disability has its roots in a principle more nearly ultimate than either waiver or estoppel, the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong. *Imperator Realty Co. v. Tull*, supra. A suit may not be built on an omission induced by him who sues. *R.H. Stearns Co. of Bost., Mass. v U.S.*, 291 US 54, 61 (1934) cited with approval in *Robel v Highline P.S. District No. 401 King County*, 398 P2d 1, 5 (Wash 1965) (citations omitted).[111]

The Commission found that when the mail carrier attempted to deliver the school district's certified letter to Gordon, Gordon's wife refused to receive it. The facts that Gordon knew that the letter was coming and that he had received notice of matters of similar importance by certified mail served to discredit his testimony that he did not refuse the letter. The Commission ruled that the fact that Gordon did not gain possession of the notice was, in effect, a product of his own actions. The Commission determined that the board's actions fully satisfied the requirement that the teacher be provided with a written statement that his work was unsatisfactory.

Timeliness of Notice

The courts have been called upon to construe the exact meaning of the phrase "sixty days before the close of the school year" as used in the Tenure Act.[112] Until August 1976, the Teacher Tenure Commission, the Michigan Supreme Court, and the Court of Appeals[113] were in agreement that the required sixty-days' notice dated from the day school actually closed in the district which would be the final day the teacher was required to perform his regular professional service. However, the Michigan Supreme Court, in *Ajluni v. West Bloomfield Board of Education*,[114] held the "close of the school" year in *all* Michigan school districts to be June 30:

> [T]o consider the close of the school year as June 30 provides the best result in construing the teacher Tenure Act as a whole. The trial Court based its decision on MCLA 340.353; MSA 15.3353,[115] which states that the school year in all districts shall commence on the first day of July. Although this does not compel as a matter of law that the last day of the school year be June 30th, such a conclusion is reasonable and supported by common sense. It also has the salutary effect of providing certainty to all parties every year of the date by which notice must be given.[116]

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[111] Id. at 3-4.

[112] MCLA 38.83; MSA 15.1983.

[113] Ajluni v. West Bloomfield Sch. Dist., 59 Mich. 231, 229 N.W.2d 385 (1975); Weckerly v. Mona Shores Bd. of Educ., 388 Mich. 731, 202 N.W.2d 777 (1972); Fucinari V. Dearborn Bd. of Educ., 32 Mich. App. 108, 188 N.W.2d 229 (1971); Carik v. Grosse Point Bd. of Educ., TTC 70-22.

[114] 397 Mich. 462, 245 N.W.2d 49 (1976).

[115] Statute citation is now MCLA 380.1133, MSA 15.4113.

[116] Ajluni v. West Bloomfield Bd. of Educ., 387 Mich. 462, 465, 245 N.W.2d 49, 50 (1976).

This rule, of course, applies to those teachers whose probationary years commence and end with the school years. As discussed later in this section, the delivery date of nonrenewal notices to probationary teachers who commenced work at times other than the beginning of the school year is calculated differently.

The technique of counting the sixty required days is shown in a Court of Court of Appeals decision.[117] (Even though the case is pre-*Ajluni*, it is nevertheless instructive). In that particular case the last day of the school year was June 7, and the court stated that the sixtieth day before the close of that school year was April 9, 1968. The court concluded that a certified letter mailed on April 8, 1968, satisfied the sixty-day requirement. The day of mailing may not count as one of the sixty days, but the next day may. Since, under present law, the close of the school year is June 30, the last day that actual and certain delivery and receipt of written notice can be given to any probationary teacher is May 1.

Because a teacher may be employed at a time other than the first day of the school year, a termination notice must be sent more than sixty days before that individual teacher's first, second, or third probationary year ends. This requirement places an additional burden on school administrators to calculate probationary years accurately for those probationary teachers who commence work at irregular times. To make these calculations accurately, teachers and administrators should become familiar with the definition of the probationary year as shown elsewhere in this chapter.

Dismissal for Cause During the School Year

The services of a teacher during the probationary period are usually based on an annual contract. It is sometimes necessary for a controlling board to terminate a probationary teacher midyear on grounds that the teacher's conduct or effectiveness is so inadequate as to constitute a breach of contract. The Tenure Act does not include procedures for discharge of a probationary teacher before the contract expires.

The stigma attached to a midyear termination of a nontenured teacher is sufficiently injurious to require a hearing, even though the hearing is not required by statute. As a general rule, in the absence of a provision in a teaching contract, a school district is not justified in dismissing a teacher without compensation before his contract expires. Dismissal during the school year of a probationary teacher with a full year contract must be for "reasonable and just cause" only.[118]

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[117] Weckerly v. Mona Shores Bd. of Educ., 28 Mich. App. 243, 184 N.W.2d 323 (1970), *rev'd* on grounds that *date of mailing* termination notice was not controlling in satisfying requirement of MCLA 38.83, MSA 15.1983 that probationary teacher shall be employed unless the board shall at least sixty days before the close of the school year provide the teacher with a definite written statement as to whether or not his work has been satisfactory. The actual date of receipt is the controlling date. Weckerly v. Mona Shores Bd. of Ed., 388 Mich. 731, 202 N.W.2d 777 (1971).

[118] Bruinsma v. Wyoming Public Schs., 38 Mich. App. 745, 197 N.W.2d 95 (1972).

The teacher is entitled to procedural due process of law.The basic procedures recommended for dismissing probationary teachers in mid-year are generally those required for dismissal of tenured teachers.

Although a probationary teacher has no statutory right to appeal a midyear dismissal to the Tenure Commission,[119] he may appeal to the circuit court as provided by the state constitution:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law. which are judicial or quasijudicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings, and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.[120]

There is also statutory provision for such an appeal:

> An appeal shall lie from any order, decision or opinion of any state board, commission or agency, authorized under the laws of this state to promulgate rules and regulations from which an appeal or other judicial review has not heretofore been provided by law, to the circuit court of the county of which the appellant is a resident. . . .[121]

The circuit court has the authority to review the transcript of the hearing held before the board of education to assure that the teacher was granted a fair hearing. When an appeal from the board decision is made to the court, the court does not review the evidence, weigh it, or enter judgment. The court will not take additional testimony nor submit the question to a jury. The court's major purpose will be to determine whether the board of education acted corruptly, in bad faith, or in a clear abuse of its powers. If the board of education acts within its scope of authority, and its action is neither unreasonable nor arbitrary, there is no basis for judicial interference.[122]

Termination of services by the board before the end of the contract period following an apropriate hearing is not a breach of contract if the dismissal was justified.But if the teacher's dismissal cannot be sustained in court, the school board has illegally revoked the contract and is subject to an action to collect damages.

The case of *Caddell v. Ecorse Board of Education*[123] provides an excellent example of the dismissal of a teacher during the term of his contract. Caddell, a probationary teacher, was suspended for violating school rules and regulations. At a hearing about six weeks later he was dismissed, and his contract was terminated on the grounds that he was absent from duty without reporting his absences, for being tardy, and for falsifying sign-in times. The circuit court and the Court of Appeals found that adequate grounds had been given for the dismissal and that the board had acted within the scope of its authority.

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[119] MCLA 38.84, MSA 15.1984.

[120] Mich. Const. art. 6, Sec. 28, (1963).

[121] MCLA 600.631, MSA 27A.631.

[122] Finch v. Sch. Dist., 225 Mich. 674, 196 N.W. 532 (1924).

[123] 17 Mich. App. 632, 170 N.W.2d 277 (1969).

Jurisdiction of Tenure Commission

The Tenure Commission has a very limited role regarding the nonrenewal of probationary teachers. The Commssion's jurisdiction is restricted to the timeliness and legal effect of the local controlling board's decision.[124] This jurisdiction has been described as shown below:

> If a teacher claims tenure as a result of satisfactory competion of probation, the determination of timeliness or legal effect of a notice of unsatisfactory work is always within the jurisdiction of the tenure commission. . . .
>
> The tenure commission may not assay a board's reasons for concluding the work unsatisfactory. The act is followed when the notice of unsatisfactory work is timely given whether based on good, bad or unsated reasons. If timely notice is given, no entitlement to tenure arises under the act. . . .[125]

Thus, when a probationary teacher appeals, the Tenure Commission determines the timeliness and adequacy of the termination notice. If the notice meets the sufficiency tests of the Act, the Commission has no authority to review the reasons for unsatisfactory service. The following decision illustrates this policy.

In *Smith v. Holly Area Schools*[126] the board's finding of unsatisfactory service was for no apparent reason; the teacher had been rated satisfactory throughout his probationary service. The teacher argued that such arbitrary and capricious conduct mandated Tenure Commission review. In rejecting the teacher's contentions, the Commission cited its previous decision in *Scott v. Armada Area Schools*:[127]

> [W]e are constrained to conclude that probationary teachers claiming that their services are predicated upon arbitrary and capricious actions may not gain redress before this Commission. We conclude that the Lipka decision obliges teachers to press such claims in another forum.[128]

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[124] Lipka v. Brown City Community Schs., 403 Mich. 554, 560; 271 N.W.2d 771, 773 (1978.

[125] Id at 559-560, 271 N.W.2d at 773.

[126] TTC 79-25.

[127] TTC 79-7.Other forums might include grievance arbitration under the district's collective bargaining agreement, an unfair labor practice charge claiming the nonrenewal was based on the board's motivation to remove the teacher for union activity, or a violation of rights guaranteed by the constitution or other laws that prevent discharge based on race, religion, sex, national origin, or age.

[128] TTC 79-25 at 4.

CHAPTER IV

Tenure Rights in Non-Classroom Positions

Introduction

Except for counselors, non-classroom tenure is applicable only to administrators. For this reason most of the discussion in this chapter is confined to tenure in position for administrators.

A school administrator who holds a valid Michigan teaching certificate is protected by the provisions of the Teachers' Tenure Act in his capacity as a teacher.[1] This is subject to certain exceptions discussed later in this chapter. He is also protected as a tenured administrator unless the employing board withholds tenure, which the board is legally permitted to do:

> If the controlling board shall provide in a contract of employment of any teacher employed other than as a classroom teacher, including but not limited to, superintendent, assistant superintendent, principal, department head or director of curriculum, made with such teacher after the completion of the probationary period, that such teacher shall not be deemed to be granted continuing tenure in such capacity by virtue of such contract of employment, then such teacher shall not be granted tenure in such capacity, but shall be deemed to have been granted continuing tenure as an active classroom teacher in such school district.[2]

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[1] MCLA 38.71, MSA 15.1971 provides, "The term 'teacher' as used in this act shall include all certificated persons employed for a full school year by any board of education or controlling board of any public educational institution."

[2] MCLA 38.91, MSA 15.1991. The Commission requires a written individual contract or collective bargaining agreement provision excluding administrative tenure in order to meet the requirements of the Act. Walsh v. Unionville-SeBewaing Area Schs., TTC 79-9; Belcovski v. Sch. Dist. Hazel Park, TTC 80-49.

Any person who holds a teaching certificate and is serving in an administrative position[3] that requires certification, but who has not acquired tenure as a teacher in the district by serving a probationary period, is protected by the provisions that apply to probationary teachers. If such a person has completed a satisfactory probationary period, he possesses tenure as a classroom teacher and is eligible for tenure as an administrator.[4] Only those administrators who hold tenure in position may appeal discharge and demotion questions.[5]

Grant and Denial of Administrative Tenure

The exclusionary tenure provision for persons holding positions "other than a classroom teacher"[6] has been the subject of a substantial number of Tenure Commission and court decisions. The legal principles established by these decisions serve in understanding how the exclusionary provision is to be applied.

It is the responsibility of the board of education either to grant tenure in an administrative position or to make certain that an exclusionary clause exists. A board of education can deny administrative tenure either by individual contract or by a negotiated collective bargaining agreement.

By Individual Contract[7]

If a board denies tenure in an administrator's written contract, it bears the burden of establishing the existence of the exclusion.[8]

In the following example, a board of education correctly excluded tenure in position by individual contract.[9] The contract contained the condition that the administrator (a school principal) was "subject to assignment and transfer at the discretion of the superintendent of schools, and subject to the rules and regulations of the board"; and the provision that "the teacher with whom this contact is made shall not be deemed to be granted tenure in the capacity of principal under or by virtue of this contract."[10] In midyear, the principal was reassigned to the position of "visiting teacher." The Court ruled that the principal's removal from his administrative position and reassignment as a teacher did not constitute a demotion; and that the wording of his contract denied him tenure in his position as a principal. The principal's rights to tenure, the Court held, were those of a teacher and did not extend to his position as a principal. The Court stated that "[t]he language of the statute is explicit that tenure is not acquired in administrative capacities when expressly excluded, as here, by the contract. That is controlling."[11]

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[3] See, however, Marshall v. Melvindale-Northern Allen Park Sch. Dist., TTC 84-1, where a certified teacher serving as a business manager could not complete probationary service in that position.

[4] Bode v. Roseville Sch. Dist., 405 Mich. 517, 275 N.W.2d 472 (1979).

[5] MCLA 38.91, MSA 15.1991. Webb v. Sch. Dist. East Detroit, TTC 80-17; Kelly v. Gobles Bd. of Educ., TTC 81-31 and 81-54.

[6] MCLA 38.91, MSA 15.1991. The Tenure Act, as first enacted in 1937, included those in administrative capacities. Dissatisfaction with such shackles on local control brought about an amendment in 1941 providing for the exemption, by contract, of those in administrative positions.

[7] It is recommended practice that school districts use standard form contracts that exclude tenure in administrative positions for which the contract applies.

[8] Goodwin v. Kalamazoo Sch. Dist., TTC 74-6-R and 75-35-R.

[9] Street v. Ferndale Bd. of Educ., 361 Mich. 82, 104 N.W.2d 748 (1961).

[10] Id. at 84, 104 N.W.2d at 750.

It should be noted, however, that even though the board had denied the principal tenure as an administrator and later transferred him to a teaching position, it was required to pay him as an administrator until his administrator contract expired. Thereafter, he received the salary he would have received had he taught continuously in the district.

If a controlling board intends to deny administrative tenure to an administrator, it must be precise in following the procedures available under the statute. In *Dodge v. Saginaw Board of Education*,[12] a tenured teacher was employed by the board of education in the capacity of principal. She received contracts for the school years 1963-64, 1964-65, and 1965-66. Each contract expressly excluded tenure as principal. For the school years 1966-67 and 1967-68, she received contracts in which language about non-acquisition of tenure did not appear. In the 1967-68 contract the word "teacher" was used; the word "principal" did not appear. The term "Tenure-Teacher" had been crossed out with a typewriter in the contract title; over this was typed "Elem. Princ."

The school board argued that striking out the word "tenure" from the printed form was the equivalent of meeting the statutory exclusionary tenure provision. The Court disagreed, holding that the board had not met the statutory requirements necessary to deny tenure. Even though the Court was satisfied that the board did not intend to grant tenure to Dodge in her administrative position, striking the word "tenure" from the printed form was an inadequate procedure for voiding tenure. The Court held that it is necessary for a board to be very specific in stating that a teacher is not to have tenure as an administrator:

> The only question we are called upon to determine is whether the employment contract provided that the plaintiff would not have tenure as principal. The defendants argue that the striking of the word 'tenure' from the printed form is the equivalent of the statutorily required provision that the teacher would not have tenure. We do not agree.
>
> Were it not for the requirement of the statute that the contract make provision for *no* tenure, in order to avoid it, the absence of provision *for* tenure might be so construed, but the statute's requirement was intended to obviate the need for construction.
>
> We are satisfied that the members of the board did not intend to grant the plaintiff tenure in the capacity of principal in the instant contract. We are satisfied from the record that they did not avail themselves of the only means available under the statute to avoid it.[13]

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[11] Id. at 87, 104 N.W.2d at 751.

[12] 384 Mich. 346, 183 N.W.2d 793 (1971).

[13] Id. at 347-348, 183 N.W.2d at 793-94 (Emphasis in original).

The Court directed the board to pay Dodge the salary difference between what she had received as a classroom teacher and what she would have received as principal.

The decision in *Dodge* illustrates an important rule.If a controlling board wishes to withhold administrative tenure, exclusionary language should be placed in the first and each subsequent administrative contract issued to that administrator.When a new contract is issued for the same position to the same administrator, the exclusionary language must be included in the new contract if the board intends to continue to deny administrative tenure. If a school district intends to exclude tenure but mistakenly issues an administrative contract with no exclusionary language, it can correct the error only by obtaining a voluntary and intentional waiver of the tenure.

In *Goodwin v. Kalamazoo Board of Education*, the Court of Appeals explained that when a district seeks to deny tenure, it need only place such a clause in the administrator's contract:

> If the contract of a tenured teacher acting as an administrator does not specify the individual is to be denied tenure, the statute stipulates that the individual is to be granted tenure in the administrative position. If the board does not want to grant tenure it simply inserts a contractual provision denying tenure.[14]

By Collective Bargaining Agreement

A provision in a collective bargaining agreement may serve to grant or deny tenure to administrators in position. The administrator in *Strohl v. Jackson Public Schools*[15] had served as administrative assistant during the 1975-76 school year under a contract that expressly excluded the acquisition of tenure in that position. He had not been issued an individual contract for the 1976-77 school year. For the 1977-78 and 1978-79 school years, he had been given contracts that included this clause: "Continuing tenure as an administrator, if not heretofore attained, is specifically withheld." Strohl argued that he had acquired tenure in his position by virtue of the fact that no contract had been executed for the 1976-77 school year. The board asserted that the 1975-76 contract had automatically been renewed by statute and that it had thereby extended the exclusion of tenure by one year. The Commission rejected this argument because Strohl's bargaining agent and the board had entered into a collective bargaining agreement, that had become effective January 1, 1977, and included a provision that superseded "any contrary or inconsistent terms contained in any individual administrator contract heretofore in effect." The Commission stated that "[s]ince the master agreement of 1977 is the controlling instrument and because it fails to explicitly exclude the acquisition of tenure, we hold that Appellant has administrative tenure."[16] A provision in a collective bargaining agreement that denies tenure to administrators meets the requirements of *Dodge v. Saginaw Board of Education*.[17]

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[14] 82 Mich. App. 559, 568-69, 267 N.W.2d 142, 147 (1978).

[15] TTC 79-8

Administrative Tenure Prerequisites

If an administrator has not yet achieved teacher tenure status, he cannot rely on the absence of an exclusionary tenure clause in his contract as a grant of administrative tenure. The case of *Anderson v. Westwood School District*[18] illustrates this principle. Anderson had been given a three-year contract that began on September 30, 1968, but he was terminated on October 16, 1969. Anderson claimed that since his contract did not deny him tenure as an administrator, the board had violated his tenure rights. The Commission held, however, that in order for an administrator to hold tenured status he must meet all other requirements of the Tenure Act. Since Anderson had served only one year under the contract prior to his termination, he had not completed the required two-year probationary period.The Commission lacked jurisdiction because Anderson was not a tenured teacher.—Anderson supports the conclusion that tenured status as a teacher is a condition precedent to administrative tenure.A non-tenured teacher serving in an administrative position cannot gain redress for removal from that position under the provisions of the Tenure Act.[19]

Scope of Applicability

Several issues have arisen regarding the scope of applicability of tenure in non-classroom positions: 1) whether positions other than administrative positions are eligible for tenure in position, and 2) whether all administrative positions in a district are eligible for tenure.

Non-Administrative Positions

Although the term "administrative tenure" is used throughout this chapter, the statute refers to tenure in positions "other than a classroom teacher."[20] This term implies that an employee in *any* non-classroom position could earn tenure in position. This implication has been the subject of considerable litigation.

In *Webb v. School District East Detroit*,[21] a 1981 decision, the Commission held that a counselor occupied a position ". . . .other than a classroom teacher." The Commission rejected the notion that MCLA 38.71, MSA 15.1991 pertained only to managerial and supervisory positions and, thus, counseling positions could never be subject to a contractual exclusion of tenure. Webb's contract, however, contained a tenure exclusionary clause which prohibited him from acquiring tenure in his position as counselor.

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[16] Id. at 9.

[17] 384 Mich. 346, 183 N.W.2d 793 (1971); Belcovski v. Sch. Dist. Hazel Park, TTC 80-49.

[18] 49 Mich. App. 406, 212 N.W.2d 232 (1973).

[19] Fellows v. Livingston Intermediate Sch. Dist., TTC 82-16; Kelly v. Gobles Bd. of Educ., TTC 81-31 and TTC 81-54; Webb v. Sch. Dist. East Detroit, TTC 80-17.

[20] MCLA 38.71, MSA 15.1991.

[21] TTC 80-17 and 80-17-2.

The counselor-tenure question was again presented in *Leonard v. Center Line Public Schools*.[22] Leonard had taught one class period each day and served as counselor for the remainder of the day. There was no contract that denied her tenure in position. She was laid off from her position as a counselor and replaced by a person with greater seniority in the system but who had never been a counselor in the district.

On appeal to the Commission, Leonard asserted that she had attained tenure in the position of school counselor and that she was improperly laid off and replaced by a teacher who did not hold counselor tenure. The board argued that Leonard could not have attained non-classroom tenure because she had been employed as a classroom teacher assigned to the school counselor position. The basis for the board's assertion was language in Leonard's contract that she had been "appointed as a teacher on tenure."

The Commission ruled that Leonard had attained counselor tenure. The reason, however, was not the terminology in Leonard's contract that determined whether she was employed in a non-classroom position. Rather, the Commission opined, it must look to the duties she performed. That controlled because Leonard served primarily as a counselor during the school day. The Commission ruled that she was employed in a non-classroom position as a school counselor and therefore held tenure in that position. However, the Commission's interpretation of the counselor-tenure question in *Webb* and *Leonard* was short-lived.

The Commission was again confronted with the issue of tenure in counseling positions in *Belanger v. Warren Consolidated Schools*.[23] In this decision the Commission reversed its decisions in *Webb* and *Leonard* and decided that the true definition of "classroom teacher," as used in the Tenure Act, was to be determined not by the duties actually performed but by analysis of the statutory language. The Commission concluded that "when a person's primary duties involve instruction *or guidance* of students that person is a 'classroom teacher' within the meaning of Article III, Section I."[24] The Commission explained its decision:

> [A] teacher is defined as 'all certificated persons' in MCLA 38.71; MSA 15.1971. Before a person can become subject to Article III he must have satisfactorily completed the probationary period. During the mandatory two year probationary period the person

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[22] TTC 81-82 and 81-82-2.

[23] TTC 83-28, 83-29, 83-30, 83-31, and 83-41.

[24] Id. at 4.

> must hold a certificate which is 'valid for the position to which he is assigned.' R 390.661(a). Further, the person must be assigned to a position which requires specific certification to fall within this definition. Thus, we find that the term 'classroom teacher' as used in Article III, Section 1 excludes any position which does not carry a specific certification requirement.[25]

In other words, the Commission now decided, counselors are "classroom" and not "non-classroom" teachers, because guidance of students is an instuctional activity; also, counselors are required to hold teacher certification that carries a counseling endorsement.[26]

Additionally, the Commission found that the language in Article III, Section 1, that identifies specific positions that are non-classroom, placed a second limitation on the term "classroom teacher":

> If the controlling board shall provide in a contract of employment of any teacher employed other than a classroom teacher, including but not limited to, *superintendent, assistant superintendent, principal, department head or director of curriculum*, made with such teacher after the completion of the probationary period, that such teacher shall not be deemed to be granted continuing tenure. . . .[27]

The Commission ruled that the specific statutory identification of these positions requires the conclusion that persons holding these administrative positions are not classroom teachers.[28] The Commission reaffirmed its definition of "other than a classroom teacher" in *Miller v. Port Huron Area School District*.[29] At this writing it appears settled that the Tenure Commission will rule that grants of tenure in position are restricted to persons holding administrative positions. However, these decisions have not yet been litigated in the Court of Appeals.

In the author's opinion the Commission's decisions in *Belanger* and *Miller* more accurately interpret the application of non-classroom tenure for counselors. Even if counselors are entitled to non-classroom designation, school districts should be able to manage this problem for two reasons. First, the designation would not likely prohibit the transfer of counselors to other counseling or teaching positions in the district. This is true because most teacher collective bargaining agreements do not provide different salaries for different counseling positions. Nor do counseling salaries often differ from those of teachers. Since "demotion" under the Tenure Act is money only, transfers of counselors with non-classroom tenure to other counseling positions, or teaching positions, would not constitute a demotion. This observation is affirmed in *Stone v. Fraser Public Schools*[30] where a counselor was reassigned to teach home economics and replaced with a counselor with less seniority.Because Stone suffered no reduction in salary, she was not "demoted." The Commission also held that Stone did not have more tenure than the counselor who replaced her because tenure is not quantifiable. Consequently, most school boards will find that non-classroom designation of counselors will not restrict counselor transfers.

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[25] Id. at 3-4 (citations omitted).
[26] R. 390.1302.
[27] MCLA 38.71, MSA 15.1991 (emphasis added).
[28] The Commission's decision in *Belanger* was reversed by the Oakland County Circuit Court.
[29] TTC 83-71.
[30] TTC 84-38.

There is a second reason related to negotiated layoff procedures. A board of education should find it relatively easy to negotiate a provision in a collective bargaining agreement with the teachers' organization removing tenure in a non-classroom position for any teacher or counselor. This is true because teachers are not likely to support a layoff system that gives counselors preference over classroom teachers. These negotiated exclusions are permissible because the Commission has ruled that a waiver provision in a collective bargaining agreement that excludes tenure in position, can be made applicable to non-classroom personnel who previously held tenure in position.[31]

Eligible Administrative Positions

All holders of administrative positions, including non-instructional supervisory positions, who have acquired teacher tenure are eligible for tenured status as administrators. The Tenure Act refers to "any teacher employed other than a classroom teacher, *including but not limited to* a superintendent, principal, department head or director of curriculum."[32] The phrase "including but not limited to" authorizes school boards to determine which administrative positions should carry tenure. Neither the Tenure Commission nor the courts can dictate which administrative positions are eligible for administrative tenure; a school board is free to fashion its administrative tenure policies as it deems appropriate.For example, one school district may wish to allow all principals to gain tenure in their administrative positions while another district allows only the high school principal to achieve tenure status. These decisions are given effect through individual contracts between a board and each of its administrators or through collective bargaining agreements between a board and the administrators' bargaining agent.

The question has arisen whether an administrator could ever gain administrative tenure in a position that does not involve supervision of instruction.In *Goodwin v. Kalamazoo School District*,[33] the Commission ruled that since "Director of Buildings and Grounds" is a position not requiring certification nor involving instructional supervision, an employee in such a position could never acquire tenure. The Court of Appeals rejected this interpretation saying:

> We read the statute as authorizing individual school districts to determine which administrative positions should carry tenure. Whether a tenured teacher who accepts an

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[31] Clifton v. Warren Consolidated Schs., TTC 81-41.

[32] MCLA 38.71, MSA 15.1991 (emphasis added).

[33] TTC 74-6-R and 75-35-R.

> administrative positions [—sic—] is to be granted tenure is to be determined by contract between the teacher/administrator and school board. We reject the contention of the parties and the Commission that the statute should be interpreted to dictate categories of administrative positions which carry tenure as a matter of law.[34]

As to the assertion of the Commission that it was not qualified to decide issues regarding non-instructional areas, the Court of Appeals stated that "[t]he Commission's claims of lack of expertise in non-instructional fields are beside the point. Their task is to determine whether an individual administrator's contract grants or denies tenure to that administrator. The commission need not look to policies behind a school board's decision to accord tenure to particular positions."[35]

Effect of Reassignment on Acquired Administrative Tenure

Does a grant of tenure in a particular administrative position create general tenure that is not limited to that position? It has been held that an administrator gains administrative tenure in a specific classification, such as principal (if administrative tenure has not been excluded in the contract), and not in every other administrative position in the district.[36] Once obtained in a particular administrative position, tenured status does not automatically carry over to another administrative assignment. For example, in *Greenan v. Glen Lake Community Schools*[37] a superintendent had held tenure as a principal in the district prior to accepting his position as superintendent. The Commission ruled that the superintendent's former tenured status as principal did not carry over to the position of superintendent, because the controlling board had specifically excluded tenure in his contract as superintendent. The Commission decision followed an earlier announced policy when it held:

> [T]here never was such an all encompassing 'administrative tenure' in the sense that a right could acquire to any available enumerated administrative position acquiring tenure in another administrative position. . . . If one acquires tenure under the present language of Article III, Section 1, in a position other than as a classroom teacher, one's tenure grants only the right to a position of the same category, if available, or the right to return as an active classroom teacher.[38]

Commission decisions support the principle that the scope of an administrator's tenure is determined by reference to his contract. In *Madison v. Lakeview Public Schools*,[39] the Commission ruled that a principal whose first two annual contracts contained no exclusionary language regarding tenure had gained tenure only as a principal. The Supreme Court held, in *Dodge v. School District of Saginaw*,[40] that a principal whose contract contained no exclusionary language regarding tenure gained tenure only in her capacity of "principal." And in a review of a Commission decision in *Goodwin v. Kalamazoo School District*, the Court of Appeals stated, "[I]n view of the Commission's two decisions that plaintiff's contracts as director of building and grounds did not deny him tenure, plaintiff has achieved tenure *in that position*."[41]

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[34] Goodwin v. Kalamazoo Sch. Dist., 82 Mich. App. 559, 566, 267 N.W.2d 142, 146 (1978).

[35] Id. at 569, 267 N.W.2d at 147. It is important to note that Goodwin had acquired tenure as a classroom teacher prior to his assignment as director of buildings and grounds.

[36] Madison v. Lakeview Public. Schs., TTC 68-12.

[37] TTC 77-33.

[38] Goodwin v. Kalamazoo Sch. Dist., TTC 75-35 at 8.

[39] TTC 68-12.

In *Strohl v. Jackson Public Schools*,[42] the Commission ruled that even if an administrator's contract for a previous position did not exclude tenure, the board could deny tenure in a new administrative assignment. Similarly, in *Fellows v. Livingston Intermediate School District*[43] the claimant argued that because none of the his contracts had excluded tenure as an administrator, but only as Coordinator of Vocational Education, he had acquired tenure as an administrator in general. The Commission rejected this theory. We may therefore state as a general rule that a denial of tenure in one administrative position does not act to grant tenure in all other administrative positions in the district.

Effect of Reassignment on Denial of Administrative Tenure

Another issue is whether a denial of tenure in one position is automatically transferred if an administrator accepts an administrative assignment of a different classification or category. In *Fortress v. Jackson Public Schools*[44] the administrator had agreed to a contract provision that "[i]t is specifically understood and agreed that you do not have legal tenure in this position, but do have tenure only as a classroom teacher. . . ." The Commission held that "[i]t is the belief of the Commission that by said contract Appellant's tenure status was excluded in *any position* other than classroom teacher."[45] It is important, however, that in this case the board of education had also adopted a resolution specifically withholding tenure from administrators.

Effect of Contract Expiration on Tenure Denial

The School Code requires that administrators be employed under written contracts. The final sentence of the statute provides that "[n]otification of nonrenewal of contract shall be given in writing at least 60 days before the contract termination date or the contract is renewed for an additional 1-year period."[46] A question is whether this sentence extends a tenure exclusion provision if no new contract is executed and the incumbent is continuously employed. This was the issue in *McKee v. Woodhaven School District*.[47] For 1972-73 McKee was given a contract as assistant principal. The 1972-73, contract which contained a clause excluding tenure, was the only contract McKee ever signed, and it was never extended. In 1975, McKee was assigned to another administrative position. He was offered a contract that excluded tenure, but he declined to sign it. (The administrative employees' association and the board were in dispute at the time over the issue of administrative tenure). At the end of the 1976-77 school year McKee was removed from his administrative position and assigned to a classroom teaching position. He appealed to the Tenure Commission, claiming that he held administrative tenure.

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[40] 384 Mich. 346, 183 N.W.2d 793 (1971).

[41] 82 Mich. App. 559, 569, 267 N.W.2d 142, 147 (1978) (emphasis added).

[42] TTC 79-8.

[43] TTC 82-16.

[44] TTC 76-16.

[45] Id. at 3 (emphasis added).

[46] The statute, which is part of the School Code of 1976, Section 132(2), MCLA 380.1 *et seq.*, governs employment contracts of school administrators:

The Commission ruled that the original bar to tenure status found in the first contract remained effective throughout the years in question.[48] This was true, the Commission held, because MCLA 380.132, MSA 15.4132 specifically provides that the written contract of an administrator shall be extended by operation of law unless ninety-days' notice of nonrenewal is given or a new contract is executed. Since McKee had never received notification of nonrenewal, the original contract—which excluded tenure—was effectively extended. McKee's acceptance of new compensation, duties, and hours constituted evidence of mutual acceptance.

McKee was appealed to the Court of Appeals,[49] which held that the final sentence in MCLA 380.132, MSA 15.4132 provided for only one renewal of the contract and consequently only an extension of the tenure exclusion for the one year period. Thereafter, the Court held, the administrator served in a tenured capacity. The Supreme Court reversed and held:

> [T]he final sentence of MCL 380.132.(2); MSA 15.4132(2) should be interpreted to give continuing effect to an original contract that is neither renewed nor abrogated over the course of several years. Where a school district once fails to sign an administrator to a new written contract, the extension clause of MCL 380.132(2); MSA 15.4132(2) serves to protect the administrator from the vagaries that attend employment under an oral contact of uncertain terms. There is no reason that a district that repeatedly fails to sign the administrator to a new written contract should be rewarded with different treatment under the statute. . . .
>
> There is no other source that can identify the intent of the parties and it is hornbook law that an employee who continues in the service of another after the expiration of a

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The board may employ assistant superintendents, principals, assistant principals, guidance directors, and other administrators who do not assume tenure in position, for terms, not to exceed 3 years, fixed by the board and shall define their duties. The employment shall be under written contract. Notification of nonrenewal of contract shall be given in writing at least 60 days before the contract termination date or the contract is renewed for an additional 1-year period.

[47] 416 Mich. 316, 330 N.W.2d 416 (1982).

[48] School administrators and boards should be aware that an expiration date on a contract does not relieve the district of the obligation to give notice of nonrenewal. Rzepka v. South Redford Sch. Dist., TTC 83-4 at 10-11.

[49] McKee v. Woodhaven Sch. Dist., 100 Mich. 195, 298 N.W.2d 881 (1980).

> contract of employment does so on the terms of the original contract, except as modified by agreement of the parties. Consequently, the tenure denials that existed in the original contracts continued in effect throughout the period that was served without a contract.[50]

Consequently, the tenure denials that existed in the original contracts continued in effect throughout the period that was served without a contract.[51]

Waiving Acquired Administrative Tenure

Tenure Commission decisions show that administrative tenure can be waived after it is acquired. The Commission first decided this issue in *LeGalley v. Bronson Community Schools*.[52] LeGalley had acquired tenure in his position as elementary principal by entering into several contracts that did not exclude tenure. Later, he signed several contracts that did exclude tenure. The board of education did not give LeGalley a raise for the 1979-80 school year. LeGalley appealed the board's decision to the Tenure Commission, claiming that the failure of the board to grant him a raise constituted a demotion under the Tenure Act. The board argued that because of the tenure exclusion in his most recent contract, LeGalley was not tenured in position; and because he did not possess tenure in his administrative position, he could not appeal because the Commission lacks jurisdiction.

LeGalley argued that Article X of the Tenure Act creates an absolute bar to waiver of tenure. This provision is:

> No teacher may waive any rights and privileges under this act in any contract or agreement made with a controlling board. In the event that any section or sections of a contract or agreement entered into between a teacher and a controlling board make continuance of employment of such teacher contingent upon certain conditions which may be interpreted as contrary to the reasonable and just causes for dismissals. provided by this act, such section or sections of a contract or agreement shall be invalid and of no effect in relation to determination of continuance of employment of such teacher.[53]

Citing authority,[54] the Commission ruled that "[a]n individual may waive rights granted under a statute where that statute was designed to protect the individual's rights rather than the interests of the general public."[55] It was the Commission's opinion that the legislative purpose for the waiver prohibition in MCLA 38.172,

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[50] McKee v. Woodhaven Sch. Dist., 416 Mich. 316, 330-331, 330 N.W. 416, 422-23 (1982).

[51] *Accord*; Rzepka v. South Redford Sch. Dist., TTC 33-4-2.The Commission held: "Appellants administrative contract was actually extended yearly, for each appellee has failed to give the statutory notice of nonrenewal." Id. at 13. It appears that an effective contractual denial of administrative tenure survives nearly everything except a subsequent written contract that fails to exclude tenure.

[52] TTC 79-52.

[53] MCLA 38.172, MSA 15.2054.

[54] 17 Am. Jur. 2d *Contracts* Section 173 (531).

[55] LeGalley v. Bronson Community Schs., TTC 79-52 at 4, *rev'd on other grounds*, 127 Mich. App. 482, 339 N.W.2d 223 (1983).

MSA 15.2054 was not to bar waivers of tenure, as LeGalley proposed, but to prevent controlling boards from demanding that teachers, as a condition of employment, waive their right to continuous employment (which is provided by the the Act). Thus, the Commission concluded, "a tenured teacher who has achieved tenure in an administrative position may waive the protections afforded him/her for that position."[56] The Commission ruled, however, that the facts did not reveal that LeGalley had voluntarily and intentionally relinquished his administrative tenure.

In a subsequent decision,[57] the Commission ruled that two Kalamazoo teachers had not waived previously acquired administrative tenure rights by signing contracts that excluded tenure. The Commission stated:

> [T]he record in the present situation fails to show that appellants were informed that they were waiving their right to previously acquired tenure by signing the contracts in question. Nor do the contracts themselves state on their face that execution of such contract will result in the waiver of any previously acquired right to tenure.[58]

More recently, the Commission has affirmed this interpretation.[59]

The Commission was again confronted with the "waiver question" in *Belcovski v. School District of Hazel Park.*[60] Belcovski had served as a principal under contracts that clearly excluded administrative tenure. In August, 1979, he was reassigned to a new position of "administrative assistant" but was not given a contract. The Hazel Park board of education argued that Belcovski's employment was covered by the terms of the collective bargaining agreement between the board and the Hazel Park Association of School Administrators, which provided for tenure exclusion. The Commission determined, however, that the recognition article of the parties' collective bargaining agreement—shown below—was not applicable to "administrative assistants":

> The Hazel Park Board of Education recognizes the Hazel Park Association of School Administrators in accordance with the applicable provisions of Act 379, Public Acts of 1965, as the sole and exclusive representative for all Administrative personnel in the classification of Principal and Assistant Principal, but excluding the Superintendent of Schools, Assistant Superintendent, Deputy Superintendent and District-wide Directors for the purpose of professional negotiations with respect to terms and conditions of employment.

The Commission found "a clear reading of this provision to include only those individuals holding the positions of principal or assistant principal to be within the bargaining group."[61] Since Belcovski's position of "administrative assistant" was not in the bargaining group, the contract provision that excluded administrative tenure was not applicable to him and did not constitute a waiver.

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[56] Id.
[57] Dyksterhouse v. Sch. Dist. Kalamazoo, TTC 80-40; Beane Sch. Dist. Kalamazoo, TTC 80-41.
[58] Id. at 9-10.
[59] Rzepka v. South Redford Sch. Dist., TTC 83-4.
[60] TTC 80-49.
[61] Id. at 9.

The Commission later decided, in *Clifton v. Warren Consolidated Schools*,[62] that a waiver provision in the collective bargaining agreement, excluding tenure in position, was applicable to administrators who previously held tenure in position. The question in *Clifton* was whether a collective bargaining agreement provision that excluded tenure in an administrative position served as a voluntary and intentional relinquishment of tenure in the position. Citing authority, the Commission determined that where an agreement has been properly ratified by the union membership it will be deemed to be the voluntary act of each member of the union, and binding on all including any dissenters. The Commission stated:

> This principle was recently applied by the Michigan Court of Appeals in *Applegate v Palladium Pub. Co.*, 95 Mich App 299, 290 N.W.2d 128 (1980).In that case the plaintiff had retired under the terms of a collective bargaining agreement which provided for mandatory retirement of all persons who were 65 years old or older. Appellant did not protest the mandatory retirement. Subsequently, appellant applied for unemployment compensation benefits, which were granted. Upon redetermination of the award, the weekly rate was reduced to reflect his receipt of retirement benefits. This redetermination was affirmed by a referee and again by the Employment Security Appeal Board.However, on appeal to circuit court, that court reversed, finding that plaintiff was not eligible for benefits because he had terminated his employment voluntarily in accordance with the contract negotiated on his behalf by the union. The Court of Appeals agreed and held that plaintiff was disqualified for unemployment benefits because of his voluntary termination of employment.In so holding, the Court declared that "[a]ction taken by employees under a contract negotiated for them by their authorized agent must be considered their voluntary act. In effect, plaintiff agreed to terminate his employment voluntarily pursuant to the collective bargaining agreement." *Applegate, supra*, at p. 305, citing *Bergsete v. Zinsmaster Baking Co.*, 4 Ohio App 2d 95, 212 N.E.2d 425 (1965), in support thereof.[63]

In *Rzepka v. South Redford School District*,[64] the Commission held that a letter of resignation constituted a voluntary and intentional waiver of previously acquired tenure.

If an administrator accepts reassignment to a different administrative position under a written contract that excludes tenure in that position, does he waive any previously acquired rights to tenure in non-classroom positions? In companion decisions[65] the Commission ruled:

> [E]xclusion of non-classroom tenure effectuated by language expressly excluding tenure in a particular position does not exclude tenure in other non-classroom positions as

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[62] TTC 81-41.

[63] Id. at 11-12.

[64] TTC 83-4.

[65] Dyksterhouse v. Sch. Dist. Kalamazoo, TTC 80-40, and Beane v. Sch. Dist. Kalamazoo, TTC 80-41.

> well. . . . [A] teacher who attains tenure in a non-classroom position has a right to continuous employment in such position, and the mere interruption or discontinuation of services in that position does not in and of itself result in the loss of the teacher's right to that position.[66]

This decision implies that if an administrator acquires tenure in position and is reassigned to another position that excludes tenure, he does not waive tenure rights in the first position.

Acquisition of Teacher Tenure While Serving as an Administrator

Can one accumulate probationary service credit and acquire tenure as a classroom teacher while serving as an administrator? It has been held that the definition of "teacher" in the Teachers' Tenure Act includes "superintendent" and that service as superintendent can qualify one for teacher tenure. The case of *Bode v. Roseville School District*[67] is instructive on this important point.

Bode was superintendent in Leslie, Michigan, serving under a two-year contract, when the Teacher's Tenure Act became mandatory in all Michigan school districts (August 28, 1964). He was not reappointed to his position at Leslie and, because of the "grandfather clause" in the Tenure Act, was not qualified for tenure. Bode's first appointment entirely under the Act was as superintendent with the Clintondale School District, from 1967 until 1970, when he resigned. On July 1, 1970, after serving part of a year on a day-to-day basis in the Roseville School District, Bode was appointed acting superintendent with a one-year contract. A two-year contract began July 1, 1971.Bode's contract as superintendent included the following exclusionary language: "The Superintendent of Schools shall not be granted continuing tenure by virtue of this agreement."

In October, 1972, the Roseville School Board reassigned Bode to the position of acting superintendent-consultant. In February, 1973, Bode received notice that he would not be employed after June 30, 1973, and he appealed to the Tenure Commission. The Board of Education argued that Bode's contract, which excluded tenure, also precluded him from achieving tenure as a classroom teacher.

The Michigan Supreme Court ruled that Bode had completed a two-year probationary period and obtained tenure as a classroom teacher by virtue of his service in the Clintondale School District as superintendent. His one year of service as acting superintendent in Roseville satisfied the Tenure Act's requirements of a one-year probationary period.

Bode was never notified that his work was unsatisfactory during either probationary year; therefore he acquired tenure as a teacher. The Supreme Court held that even though Bode's contract denied him tenure as superintendent, the provision could not be construed to deny him tenure as a teacher. Furthermore, the exclusionary tenure language in his administrative contract could not be applicable to his teacher tenure status, because the Tenure Act prohibits a teacher from waiving any rights or privileges.

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[66] Id. at 8-9.

[67] 405 Mich. 517, 275 N.W.2d 472 (1979).

The Supreme Court's decision in *Bode* upheld the Tenure Commission. The Commission had been consistent in is rulings on this issue: A school administrator who had not acquired tenure by serving as a classroom teacher prior to accepting an administrative post nonetheless earns such teacher tenure for purposes of the Teachers' Tenure Act while employed as an administrator of a local district even if his contract precludes his earning tenure as an administrator.[68]

The principles discussed in *Bode*, however, are not applicable to employees who hold administrative positions for which teacher certification is not required. A person who does not possess teacher tenure and is assigned to a position in a school district that does not require teacher certification cannot complete a probationary period while serving in that position.[69] This principle is illustrated in *Marshall v. Melvindale-Northern Allen Park Public Schools*.[70]

Marshall, a certified teacher, was first employed as the district's business manager in 1976. All of his contracts excluded tenure in his administrative position. Marshall was dismissed in 1983, and the board refused to assign him to a classroom position. He appealed to the Tenure Commission, alleging that the board had failed to assign him to a vacant high school mathematics position for which he was certified to hold. In prior decisions the Commission had ruled that school employees with teaching certificates who are assigned to positions that do not require certification—such as business managers—are not teachers for purposes of completing the initial probationary period. Because Marshall had never been employed in Michigan as a classroom teacher, he had never completed the mandatory two years of service while holding a position for which a teaching certificate is required.[71]

At issue in *Loeffler v. Monroe Public Schools*[72] was whether an administrator of adult education could acquire classroom tenure. The board, relying on the Commission's decision in *Kellerman v. Bay City Public Schools*,[73] argued that since adult education teachers are not required to be certified, they cannot acquire tenure; therefore, neither can adult education administrators. The Commission stated:

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[68] Fellows v. Livingston Intermediate Sch. Dist., TTC 82-16; Munger v. New Buffalo Bd. of Educ., TTC 82-6; Strohl v. Jackson Public Schs., TTC 79-8; Savel v. Clintondale Sch. Dist., TTC 78-48; Lindner v. Ypsilanti Sch. Dist., TTC 70-24; Madison v. Lakeview Sch. Dist., TTC 68-12.

[69] Oates-Ulrich v. Okemos Public Schs., TTC 82-24-R, and decisions cited therein.

[70] TTC 84-1.

[71] The author recognizes the disparity that exists between the Commission's ruling that a person who holds a teaching certificate cannot accumulate probationary service credit while serving as a business manager (Marshall, TTC 84-1) and the Court's ruling that a director of buildings and grounds who had successfully completed a probationary period as a teacher could achieve tenure as administrator. Goodwin v. Kalamazoo Sch. Dist., 82 Mich. App. 559, 267 N.W.2d 142 (1978).

[72] TTC 84-25.

[73] TTC 80-50-R.

> We do not believe *Kellerman* has any application to the instant circumstances. Appellant was not employed as an adult education instructor. Rather, she was employed in an administrative position. As an administrator she is eligible to acquire classroom tenure.[74]

Layoff and Recall Rights

Even if an administrator has tenure in his position, a board of education has the authority to eliminate the position if the reasons are valid. The Tenure Commission must determine factually whether a school board's decision to reduce personnel is in good faith or an excuse for wrongful discharge or demotion.

If an administrator has a contract with an exclusionary tenure provision, the controlling board may terminate him as an administrator upon expiration of his contract, for any reason or no reason at all. Whatever rights he has as a tenured teacher, however, are retained.[75] The purpose of this provision is to ensure that a tenured classroom teacher who assumes administrative duties under contract does not forfeit the right to return to the classroom as a tenured teacher if his administrative duties are terminated. In most school districts, however, an administrator's rights to placement when returning to classroom teaching would be subject to the provisions of the teachers' collective bargaining agreement

Upon expiration of an administrative contract, the right exists to placement in a classroom that is comparable to a tenured teacher's right to placement in a classroom after a voluntary leave of absence.[76] In other words, an administrator returning to the classroom has the same right of placement as any other tenured classroom teacher.[77] A controlling board is required to recognize and implement an administrator's right to return to the classroom and is obligated to offer him classroom employment.

An administrator returning to the classroom is not automatically guaranteed a job, however. If the number of teachers exceeds the number of classroom positions available, the controlling board must consider the former administrator along with the pool of actively employed classroom teachers and determine which teacher or teachers will be laid off.[78] Furthermore, a school district is not always required to place the former administrator immediately. In *Herman v. West Bloomfield Hills School District*,[79] for example, a superintendent's contract expired January 1, but the board was not required to make a classroom assignment until the start of the next semester on January 31.

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[74] Loeffler v. Monroe Public Schs., TTC 84-25 at 3.

[75] Goodwin v. Kalamazoo Bd. of Educ., 82 Mich. App. 559, 267 N.W.2d 142 (1978).

[76] Rzepka v. South Redford Sch. Dist., TTC 83-4; Fellows v. Livingston Intermediate Sch. Dist., TTC 82-16; Savel v. Clintondale Sch. Dist., TTC 78-48.

[77] Fellows v. Livingston Intermediate Sch. Dist., TTC 82-16; Lyon v. Wyoming Public Schs., TTC 77-37.

[78] Bebeau v. Van Dyke Public Schs., TTC 78-37-M.

[79] TTC 83-16.

Discharge or Demotion of Tenured Administrators

The only Michigan tenure decision of record where a tenured administrator has been demoted is *Grostick v. Kaleva-Norman-Dickson Board of Education.*[80] The board demoted an elementary principal, but the Commission unanimously rejected every charge and ordered reinstatement with full back pay.

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[80] TTC 83-78.

CHAPTER V

Layoff and recall

Authority of Local Controlling Boards

The Teachers' Tenure Act does not infringe upon a district's authority to release probationary and tenured teachers when their services are not needed.[1] The authority to operate schools and and determine educational policy is found in MCL 380.1282; MSA 15.41282:

> The board of a school district shall establish and carry on the grades, schools and departments it deems necessary or desirable for the maintenance and improvement of the schools, determine the courses of study to be pursued, and cause the pupils attending school in the district to be taught in the schools or departments the board deems expedient.

The Michigan Court of Appeals explained the impact of this policy:

> In our opinion, construction of the tenure law in harmony with the expressed legislative policy to protect teachers from arbitrary and unreasonable practices does not permit a construction so liberal as to entirely destroy the right of a local board to independently determine matters of policy in the administration of local school affairs.[2]

The Tenure Act does not include a list of the reasons that a local school board may rely upon in order to make necessary reductions in personnel. However, appropriate reasons include lack of money, decreased enrollments, program changes, or territorial changes affecting the boundary lines of the district (consolidation, attachment, or annexation).

In a case cited with approval by the Michigan Court of Appeals,[3] the Supreme Court of Oregon held that school authorities have the right to dismiss a teacher when, for some reason not personal to the teacher, his services are no longer necessary, (despite the statutory limitations in the Oregon Tenure Law upon the power to dismiss). The Oregon Court stated:

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[1] See Annot., Right to Dismiss Teachers Because Service Not Needed, 100 A.L.R.2d 1141 (1965).

[2] Chester v. Harper Woods Sch. Dist., 87 Mich. App. 235, 246, 273 N.W.2d 916, 920 (1978).

[3] Funston v. Dist. Sch. Bd., 130 Or. 82, 278 P. 1075 (1929), cited in Steeby v. Highland Park Sch. Dist., 56 Mich. App. 395, 397, 224 N.W.2d 97, 98 (1974).

> [W]hen such an employee's services must be discontinued because of the demands of economy, or by reason of a lack of pupils, the cause does not have its inception in the teacher, but arises from a source foreign to her and over which she possesses no control. But when her misconduct results in a complaint and subsequently in a dismissal, the cause is personal to herself. Because a ground of removal of the type first above mentioned is one which she could not explain away, statutes of this kind, which regulate the dismissal of teachers and other public employees generally, are interpreted as intending only a regulation of dismissal for causes to the employee. An investigation into a situation of the type first mentioned would constitute an inquiry into the policy of the board, and the wisdom of the course it adopted. It is not difficult to perceive that a few decisions by the reviewing tribunal upon matters of policy, adverse to the board, would soon dispossess the latter of its authority and ursurp it to the former.[4]

The Michigan Supreme Court has not ruled on this precise question under the Teachers' Tenure Act, but it has ruled on a similar point that involved release of municipal employees. In *Swahtush v. City of Detroit*, the Court stated:

> But it is well settled that statutes forbidding municipal officials from removing appointees except for *cause* are not intended to take away the power given such officials over the administrative and business affairs of the municipality, and do not prevent them from terminating the employment of an appointee by abolishing the office or position which he held, if the action abolishing it be taken in good faith for some legitimate purpose and is not a mere subterfuge to oust him from his position.[5]

In *Slavin v. City of Detroit*, the Court stated that "[i]n coming to our conclusion, we have not been unmindful of the fact that appointments to the fire department are regulated by civil service provisions in the charter, which however, do not affect dismissals made for reasons of economy."[6]

In *Fricke v. City of Grand Rapids*, the Court stated:

> Authorities universally sustain the proposition that a city can dismiss a civil service employee by abolishing the position which the employee holds. *Smith v. Flint City Commission*, 258 Mich. 698, and cases cited therein; and that a city may abolish a position for bona fide reasons of economy, *Slavin v. City of Detroit*, 262 Mich 173. It is conceded by plaintiffs that if an office or position in the city government is abolished for bona fide reasons of economy, the holder of that position is not entitled to a hearing before the civil service board under the civil service provisions of the city charter.[7]

Based on these cases, a school district has the full authority to reduce its teaching staff, if the reasons are not personal to the teacher and are for the benefit of the district. This right is also implied in the language of the Teachers' Tenure Act: "Any teacher on permanent tenure whose services are terminated because of a necessary reduction in personnel shall be appointed to the first vacancy in the school district for which he is certified and qualified."[8] This principle has been adopted by the Tenure Commission. In *Schnooberger v. Hartford Public Schools*, the Commission stated:

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[4] Id.

[5] 257 Mich. 389, 396-97, 241 N.W. 265, 267-68 (1932), quoting from State *ex rel.* Quintin v. Edwards, 40 Mont. 287, 106 P. 695 (1910).

[6] 262 Mich. 173, 179,247 N.W. 145, 147 (1933) (citations omitted).

[7] 278 Mich. 323, 329, 270 N.W. 697, 700 (1936).

> A controlling board, may in good faith, reduce its professional teaching staff to comply with a corresponding decrease in student population, lack of interest in a course, program or department, or for other justificable cause.[9]

The Tenure Commission may not overturn a board's decision to reduce personnel unless the Commission finds that the decision was arbitrary, unreasonable or made in bad faith.

Order of Lay Off

The order of layoff of teachers is discussed in this section.

Probationary Teachers

The Tenure Act does not prescribe the procedure for determining which probationary teachers are to be laid off first. The Tenure Act allows a local board of education to pick and choose freely from its list of first-year teachers those it wishes to lay off, but second-year and third-year probationary teachers who have successfully completed their last probationary year must be treated as if they are tenured teachers.

The sixty-day notice requirement in MCLA 18.83, MSA 15.1983, which applies to the termination of probationary teachers, is not applicable when termination is prompted by insufficient funds or declining enrollments rather than poor teacher performance. In a layoff situation, a board of education is not making a judgment about the probationary teacher's competence. The legislature's concern in creating the notice requirement was to inform probationary teachers who were to be terminated for poor performance that their work was not satisfactory.

First-year probationary teachers have no legal standing under the Tenure Act to question a school board's judgment in layoff situations; therefore, if they are laid off, they have no statutory tenure rights to a hearing before either the local board of education or the Tenure Commission.

A second-year or third-year probationary teacher who is notified that his teaching position has been eliminated and that he therefore will not be rehired for the next school year nonetheless acquires tenure status in the district unless his termination was for poor performance and the school board provided him with timely written notice that his work was unsatisfactory.[10] Consequently, second-year and third-year probationary teachers will be favored over first-year probationary teachers in layoff and recall situations.

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[8] MCLA 38.105, MSA 15.2005.

[9] TTC 77-38 at 7.

[10] Holton Public Schs. v. Farmer, 77 Mich. App. 765, 259 N.W.2d 219 (1977). Farmer, a probationary teacher, was notified only that his teaching position had been eliminated. He became a tenured teacher because the board failed to give timely notice of unsatisfactory service.

Tenured Teachers

A tenured teacher is never in competition with probationary teachers in layoff and recall situations.[11] The Attorney General has ruled that a controlling board may not refuse employment to a tenured teacher while a probationary teacher continues to occupy a position for which the tenured teacher is legally qualified even if a probationary teacher must be dismissed in order to accommodate the tenured teacher.[12] Therefore, if a reduction is made and a place remains that a tenured teacher is "certified and qualified" to fill, the tenured teacher must be given preference for that position over a probationary teacher.

An on-staff tenured teacher has the first right to placement in a position for which he is certified over those teachers whose services have been previously terminated due to a necessary reduction in personnel. In *Starrs v. Linden Community Schools* the Commission stated:

> [A]n actively employed tenured teacher holds a superior right to retain his or her position over those teachers whose services have been terminated due to a necessary reduction in personnel.More specifically, an on-staff tenured teacher does not stand in competition with teachers whose services have been terminated for placement or retention in a particular position.[13]

A board may in good faith transfer an on-staff teacher to fill a vacant position even if there are laid off tenured teachers who are certified and qualified for the position.

When a board must decide which tenured teachers to lay off, those teachers who are certified for the remaining positions are eligible for retention, provided they meet the board's qualification standards. Although a controlling board may adopt seniority as a qualification standard for determining priority in layoff situations, the Tenure Act does not provide for relative tenure or seniority rights among tenured teachers. One teacher does not have more tenure than another regardless of his seniority in the district. Tenure is not quantifiable; it is a status acquired upon successful completion of a probationary period.[14]

Tenured teachers do not have a statutory right to a hearing before the local board of education if they were laid off because their services were not needed.[15] In *Steeby v. Highland Park School District*, Judge Valkenburg stated:

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[11] Hendges v. Oak Ridge Public Schs., TTC 80-29; Arnold v. New Haven Community Schs. TTC 79-11; Farmer v. Holton Public Schs., TTC 78-52.

[12] 1961-62, p. 265, OAG No. 3609 (Feb. 7, 1962).

[13] TTC 82-33 and 82-54 at 9, *accord*, Page v. Harper Woods Public Schs., TTC 73-60-R, *aff'd* Court of Appeals Docket No. 50235 (1981).

[14] Stone v. Fraser Public Schs., TTC 84-38; Kimichik v. Rudyard Area Schs., TTC 78-29; Defrain v. River Rouge Sch. Dist., TTC 77-29.

[15] Anderson v. Harper Woods Schs., 74 Mich. App. 227, 253 N.W.2d 718 (1977).

> Indeed, there would appear to be no real reason for a hearing where the reason for termination is reduction in personnel rather than personal charges against a teacher since the purpose of the hearing is to provide the opportunity for the teacher to answer the charges being brought against him. The protection which the act provides where the termination is the result of a reduction in personnel is not that of a pointless hearing but is rather that found in MCLA 38.105. . . . which provides that those tenure teachers thereby terminated shall be appointed to the next vacancy.[16]

Notice Requirements

The Court of Appeals stated that "if a teacher is to be afforded the right to tenure commission review of a board's 'economic necessity' termination, the teacher must be properly notified of his or her right to that review."[17] Notice must sufficiently advise the teacher of the pending action and give him an opportunity to present objections.[18] Proper notice is required every time a board takes action that may adversely affect a teacher's rights under the Tenure Act. When a board of education is involved in layoff and recall matters, it is very important that the Tenure Act's provisions for notice of appeal be carefully followed.[19]

Notice requirements are important to teachers because of the relationship of appeal rights. A board of education must give laid-off tenured teachers, certified for but not returned to a new or vacant position, a statement of their rights under the Act. Notice must be given because a teacher may not be aware of the rights. If a teacher fails to initiate an appeal within the thirty days required by the Act, the Commission will not consider his claim.

Tenure Act Appeal Rights

The Teachers' Tenure Act establishes the appeal rights of teachers who are terminated because of a reduction in staff. Article VI, Section 1 of the Tenure Act provides, "A teacher who has achieved tenure status may appeal any decision of a controlling board under this act within 30 days from the date of such decision. . . ."[20]

Adequate notice triggers the running of the thirty-day appeal period. Receipt of notice establishes a definite date from which the appeal period can be measured and provides an opportunity for both parties to resolve timely and efficiently any dispute before the Tenure Commission. This thirty-day period of limitation does not begin until the teacher actually receives adequate notice of the school board's decision and notice of his rights under the Tenure Act, including his right to appeal.[21] A petition challenging the action of a board of education must be filed with the Commission within thirty days of receipt of that decision. A tenured teacher's appeal rights are barred for untimeliness if he does not begin his appeal within the thirty-day appeal period.

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[16] 56 Mich. App. 395, 399, 224 N.W.2d 97, 99 (1974).

[17] Goodwin v. Bd. of Educ., 82 Mich. App. 559, 572, 267 N.W.2d 142, 148 (1978).

[18] Sponick v. Detroit Police Dept., 49 Mich. App. 162, 211 N.W.2d 674 (1973).

[19] The sixty days' notice requirements for termination for probationary teachers in MCLA 38.83, MSA 15.1983 and for tenured teachers in MCLA 38.102, MSA 15.2002 are not applicable in layoff situations. The Tenure Act permits a board to give layoff notices at any time. Teacher organizations and boards often negotiate notice requirements.

[20] MCLA 38.121, MSA 15.2021.

Failure to provide proper notice "tolls" the running of the thirty-day period.The appeal period for a particular action or decision is tolled until the controlling board comes into compliance with the Act by giving the teacher a statement of rights under the Teachers' Tenure Act that are applicable to that particular action or decision.

The purpose of requiring controlling boards to provide teachers with notice of their right to appeal was stated in *Goodwin v. Board of Education of Kalamazoo*:

> In *Biberstine v. Port Austin Public School District No. 9*, 51 Mich App 274; 214 NW 2d 729 (1974), lv den, 392 Mich 766 (1974), the Court held that the 30-day statutory limitation for filing an appeal with the tenure commission is tolled when the board of education fails to give a teacher written notice of charges and a statement of rights under the act. Such notice and statement of rights, as well as a hearing, are required under MCLA 38.102; MSA 15.2002 upon discharge or demotion of a tenured teacher. However, notice, charges and a school board hearing need not be given when a teacher's position is being eliminated due to a lack of funds. *Steeby v. School District of the City of Highland Park*, 56 Mich App 395; 224 NW2d 97 (1974). In *Steeby* the Court concluded that there would be no reason for "charges" or a school board hearing in an economic discharge situation since the teacher's conduct or performance is not being called into question. . . .
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> . . . .A 30-day statute of limitations is an extremely rigorous requirement. In concluding the statute was tolled unless a teacher is given proper notification of his or her rights, the Court in *Biberstine* was obviously concerned that teachers will be unaware of the brief 30-day appeal period. . . .
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> . . . .While *Biberstine* deals with a situation where the school board was discharging for cause, the statutory appeal period is the same in an economic termination case and the need for notification of the teacher's right to appeal is equally great. . . .
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> . . . If a teacher is to be afforded the right to tenure commission review of a board's "economic necessity" termination, the teacher must be properly notified of his or her right to that review.[22]

Criteria for Adequate Notice

The notice must come from the board of education; notice from another source is not sufficient. It is the board of education that has an obligation to notify teachers of their right to appeal. In *Kramer v. Van Dyke Schools*, the Court stated that "actual notice received by a teacher from another source does not excuse a school board's failure to comply with its obligation to provide clear and informative notice."[23] The fact that a teacher was given his rights under the Tenure Act on prior occasions, or was informed by his attorney does not constitute sufficient notice of appeal.

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[21] Tomiak v. Hamtramck Sch. Dist., 138 Mich. App. 644, 360 N.W.2d 257 (1984); Goodwin v. Bd. of Educ. 82 Mich. App. 559, 267 N.W.2d 142 (1978); Biberstine v. Port Austin Public Sch. Dist. No. 9., 51 Mich. App. 274, 214 N.W.2d 729 (1974).

[22] 82 Mich. App. 559, 571-72, 267 N.W.2d 142, 148 (1978).

Whether or not the teacher was aware of his appeal rights is not controlling and does not determine when the appeal period commences to run. In *Tomiak v. Hamtramck School District*,[24] the Court of Appeals held that even if the teacher knew or should have known of his layoff, the thirty-day appeal period did not begin to run until he received notice of the board's decision and of his rights under the Tenure Act, including the right to appeal. In *Fara v. Coloma Community Schools*,[25] the Commission rejected the board's defense that the teacher's claim was barred. The board argued that the teacher was aware of her rights under the Act, knew that probationary teachers had been hired, and did not object. In rejecting the board's contention, the Commission quoted from its decision in *Glynn v. Millington Community Schools*:

> Although Appellant may have been aware of his right to assume a teaching position, the controlling board failed to meet its obligation to notify him of his method of redress. Thus to apply the doctrine of laches would permit appellee to "profit from its own wrongdoing."[26]

Notice must be provided for each board action that may affect a laid-off teacher. In *Kramer v. Van Dyke Public Schools*,[27] the board argued, unsuccessfully, that when it had provided notice on prior occasions, the teacher was likely aware of his rights. Similarly, in *Six v. Muskegon Public Schools*,[28] notice that had been given on four prior occasions did not suffice to constitute adequate notice for the fifth occasion. In this case the Commission ruled that the *Biberstine-Goodwin* doctrine requires the board to give notice each and every time it takes action that may adversely affect a teacher's rights under the Tenure Act. The Commission stated:

> Our reason for this conclusion is quite simple. We have repeatedly held that a teacher's actual knowledge of his or her rights is not controlling in determining when the appeal period begins to run. Rather, the operative factor is: When did the controlling board bring its actions into compliance with the Act? Clearly, a controlling board must be expected to comply with the Act each time it takes action. . . .
>
> . . . .
>
> Accordingly, we hold that the appeal period for a particular action or decision is tolled until a controlling board provides the teacher with a statement of rights under the

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[23] 134 Mich. App. 479, 488, 351 N.W.2d 572, 576 (1984).
[24] 138 Mich. App. 644, 360 N.W.2d 257 (1984).
[25] TTC 82-12.
[26] TTC 79-24 at 10.
[27] TTC 80-8-2.
[28] TTC 81-17.

> Teachers' Tenure Act with respect to that particular action or decision. Providing notice of rights on prior occasions is not sufficient to commence the running of the appeal period with the respect to subsequent, distinct actions or decisions.[29]

In *Kramer v. Van Dyke Public Schools*,[30] the controlling board of education argued that even if the letter it had sent to the teacher was insufficient to advise her of her rights, she nevertheless was fully informed of her rights after her attorney wrote to the controlling board requesting action on her status with the district. The Court ruled that the thirty-day limitation is tolled until a teacher receives her notice of rights *from the school board*. The Court explained the purpose of this rule:

> This burden was placed on school boards to ensure that they did not controvert the purposes of the teachers' tenure act by disguising board decisions, hoping teachers would not learn of their statutory right to appeal. In keeping with this purpose, we hold that actual notice received by a teacher from another source does not excuse a school board's failure to comply with its obligation to provide clear and informative notice.[31]

The notice need not include an entire copy of the Tenure Act.A notice is minimally sufficient to meet the requirements of the Act if it informs the teacher that he may appeal the board's decision within thirty days, which is what the statutory language provides. The Court's holding in *Goodwin* supports this. In *Nestell v. Bridgeport-Spaulding Community Schools*,[32] the Commission held that the following statement from the board constituted adequate notice:

> You are further advised that the Teacher's Tenure Act allows you the opportunity to appeal the board's decision with the Tenure Commission within 30 days.

In *Mullin v. Crestwood School District*, the layoff notice included the following statement:

> Enclosed for your information is a copy of the Teacher Tenure Act explaining your rights as a tenure teacher. (38.105 Necessary reduction in personnel; first vacancy. Section 5 and 38.121 Appeal to State Tenure Commission; Notice, hearing, Section 1).[33]

The Commission ruled that the notice was reasonably calculated to inform the teacher of her right to appeal and the time limits on the exercise of that right.

The notice need not include the date from which the appeal period commences to run. Sometimes teachers will allege that the written notice sent by the board of education notifying them of layoff was inadequate because it failed to specify the day the thirty-day appeal period began to run. If a notice clearly informs the teacher he has thirty days to challenge the board's decision to lay him off, the appeal period begins when he receives the notice. As discussed later, it is imperative that the board tell the teacher which actions the notice refers to.

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[29] Id. at 6-7.

[30] 134 Mich. App. 479, 351 N.W.2d 572 (1984).

[31] Id. at 488, 351 N.W.2d at 576.

[32] TTC 81-2, *aff'd*, 138 Mich. App. 401, 360 N.W.2d 200 (1984).

[33] TTC 84-5.

A controlling board is not required to inform the teacher of the *Goodwin* doctrine (that the thirty-day appeal does not commence to run until the teacher receives adequate notice). In *Nestell v. Bridgeport-Spaulding Community Schools*,[34] the controlling board of education included the following statement in the teacher's layoff letter: "You are further advised that the Teacher's Tenure Act allows you the opportunity to appeal the board's decision with the Tenure Commission within 30 days." In concluding that the notice informed the teacher that she could appeal the board's decision within thirty days, which is what the statutory language provides, the Commission held that the information provided met the minimum requirement for adequate notice of the right to appeal. The Commission stated:

> In effect appellant would have us hold that appellee is accountable for her inaction and that a controlling board is responsible for providing teachers it employs with accurate and current legal counsel. Such a holding would be contrary to the nature of an adversarial legal system. Further, we believe that both the district's interest in certainty and speed in the resolution of tenure claims and the teacher's rights under the Act are better served if the controlling board is not held to the standard appellant proposes.[35]

In the notice, the controlling board must specify which board decisions are appealable. In *Kramer v. Van Dyke Public Schools*,[36] the Court of Appeals held that the inclusion of a clean copy of the Teachers' Tenure Act, without any indication of which board decisions were appealable, constituted insufficient notice.

In *Kramer*, the controlling board notified the teacher that she would be recalled after a two-year layoff. The board gave the teacher a letter that stated: "Enclosed is a copy of the Tenure Act which outlines your rights for a hearing in the event you do not agree with any board decision." Because the letter did not specify that its previous decisions could be appealed, it did not adequately advise the teacher of her right to appeal the board's earlier decision regarding her recall. The Court stated:

> All that was required for adequate notice in this case, was for the board to tell plaintiff that she had a right to appeal any of its previous decisions affecting her employment status, and that such an appeal had to be perfected within 30 days of receipt of the letter providing such notice. This additional sentence or two is not an undue burden on defendant. This is not more than notice of plaintiff's rights under the tenure act as defendants contend.[37]

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[34] TTC 81-2.

[35] Id. at 8, quoting from Kramer v. Van Dyke Public Schs., TTC 80-8 at 5-6.

[36] 134 Mich. App. 479, 351 N.W.2d 572 (1984).

[37] Id. at 487, 351 N.W.2d at 576, adopting and quoting from opinion of the Circuit Court.

It is readily apparent from *Kramer* that in order to fulfill the notice requirements of the Act, the board must specify in its layoff notice which of its decisions are appealable. A layoff notice with a copy of the Act attached, even if there is a reference that it is attached, does not constitute adequate notice of appeal rights.

A laid-off teacher must be notified if a probationary teacher has been appointed to a position for which the laid-off teacher is certified. Open positions must be offered to certified and qualified tenured teachers rather than to probationary teachers, regardless of the superior qualifications a probationary teacher may possess. Tenured teachers whose services have been terminated because of a necessary reduction of personnel are entitled to preference over probationary teachers; they are not in competition with new hires or probationary teachers.[38]

A controlling board has an obligation to contact teachers. In *Arnold v. New Haven Community Schools*,[39] the board argued that the teacher did not keep the district informed of his various addresses during his layoff, and that therefore any attempt to contact him would have been futile.The Commission found that the controlling board made no attempt to contact the teacher. The Commission ruled:

> [W]here the Board has sent notice to the teacher at his/her last known address, the teacher's failure to advise the Board of his/her current residence could bar the teacher's later claim. Here, the Board did not attempt to contact Mr. Arnold regarding these positions. As no such attempt was made, this defense (a claim of not knowing the teacher's current address) has not been established.[40]

Laid-off teachers have an obligation to keep the controlling board informed of their current address. A controlling board is only required to attempt to contact a teacher at the last address he provided. Teachers are also required to keep the district informed of their certification status.[41]

Definition of Vacancy

Introduction

The Teachers' Tenure Act provides: "Any teacher on permanent tenure whose services are terminated because of a necessary reduction in personnel shall be appointed to the first vacancy in the school district for which he is certified and qualified."[42]

Administrators, teachers, and teacher organization leaders are often in disagreement about whether a teaching vacancy exists that requires the recall of a teacher. Obviously, recall rights are triggered when a vacancy occurs. However, it is not always easy to determine when there is a vacancy that requires recall. The term *vacancy* is not defined in the Tenure Act, and dictionary definitions are not helpful. It is the responsibility of the Tenure Commission to establish a reasonable definition; it cannot be left to school districts or the collective bargaining process. Over time, certain legal principles have emerged that define vacancy as used in the Tenure Act.

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[38] Six v. Muskegon Public Schs., TTC 81-17.

[39] TTC 79-11.

[40] Id. at 14.

[41] Fara v. Coloma Community Schs., TTC 82-12.

[42] MCLA 38.105, MSA 15.2005.

Vacancies Requiring Recall

The conditions that create a vacancy requiring recall include leave of absence, resignation, retirement, or death of an on-staff teacher; removal of a teacher from office; or a decision of a competent tribunal declaring an appointment void. A vacancy does not exist as long as there is an incumbent in the position. Often incumbents are absent from their positions because of illness, and teachers on layoff seek to be recalled to these positions. Sometimes laid-off teachers believe they should have been recalled to part-time positions. Intially, the Commission ruled that an absence of an on-staff teacher created a vacancy when the replacement teacher was required to assume "full responsibility" for the classroom. As described later, this policy was rejected by the courts. The Court of Appeals has determined that "[w]here a position is temporarily open due to a teacher's illness, and where the teacher has a right to return when health permits, no vacancy is created within MCL 38.105; MSA 15.2005."[43]

However, as described below, the question of when an absence due to illness becomes a vacancy has been difficult to determine. In early decisions the Commission held that when a teacher is required to assume "full responsibility" for the teaching duties associated with an assignment, compensation at less than the salary paid to "regular" teachers constitutes a demotion.[44]

The Tenure Commission discussed vacancies created by illness in *Weidman v. Brandon School District*:

> [W]e do not believe that every time a teacher is absent from the classroom a vacancy is created, thereby mandating recall of a laid off tenured teacher at the appropriate level on the salary schedule. Rather, we find the touchstone must be that the known or anticipated duration of the absence will be so long as to reasonably require the replacement teacher to assume full responsibility for the absent teacher's duties. . . .The rationale underlying this result is grounded on the Act's purpose. Where an on-staff teacher's absence will be so long as to leave the essential functions associated with the assignment unmet, the Act's goal of retaining the teachers who have demonstrated their competency requires that a certified and qualified tenured teacher awaiting recall assume the position.Moreover, we conclude that a similar test must be applied where the on-staff teacher is involved in a continuing day-to-day absence.[45]

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[43] Weidman v. Brandon Bd. of Educ., 143 Mich. App. 207, 214, 371 N.W.2d 910, 913 (1985).

[44] Masters v. Hamtramck Bd. of Educ., TTC 77-20; Brumbaugh v. Lincoln Park Bd. of Educ., TTC 73-73-R.

[45] TTC 81-53 at 7-8.

The Commission then stated its criterion for ascertaining the existence of a vacancy:

> Accordingly, we hold that in these situations, a vacancy for purposes of recall occurs at a time the school board or its agents knows or should know that the on-staff teacher's absence will be of sufficient duration as to reasonably require the replacement teacher to assume *full responsibility* for the classroom.[46]

Full Responsibility Test

The Commission defined—full responsibility as follows:

> [F]ull responsibility for teaching goes beyond mere lesson planning. It may include responsibility for preparing or securing instructional materials, grading and evaluating students, meeting with parents, maintaining attendance and disciplinary records, and other required functions.[47]

In *Weidman*, the on-staff teacher (Vaughn) was absent sporadically during the fall semester, including all of December. On her physician's recommendation she spent January in Florida, and after unsuccessful treatment she continued to be absent. The Commission determined that the school officials knew on February 18th that Vaughn would be absent for at least six weeks. The question then was whether an absence of six weeks, coupled with the fact that the replacement teacher would need to prepare lesson plans, was sufficient to establish that the replacement teacher would have to assume full responsibility. The Commission ruled that it was not sufficient, concluding that full responsibility for a teaching assignment extends beyond the classroom: It includes such functions as preparing or securing instructional materials, grading and evaluating students, meeting with parents, and maintaining attendance and disciplinary records. Because there was no indication that a replacement teacher could have assumed full responsibility for these tasks, the Commission held that a vacancy for purposes of recall had not been established.

In *Armstrong v. Southfield Board of Education*,[48] the Commission again applied the "full responsibility" test. The school district had determined that a vacancy for purposes of recall was created when the absent teacher became eligible for long-term disability benefits.The Commission found that this practice was not consistent with its full responsibility test in *Weidman*. Consequently, it ruled in *Armstrong* that the position to which the appellant claimed she should have been recalled became a vacancy when the replacement teacher was required to assume full responsibility for the classroom, not when the teacher was placed on long-term disability status.

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[46] Id. (emphasis added).
[47] Id.
[48] TTC 81-18.

The Commission also applied its full responsibility test in *Goodrich v. Mt. Morris Consolidated Schools*,[49] in which a laid-off tenured teacher had been employed to replace an on-staff teacher who was taking a four and one-half month leave of absence. He assumed full responsibility for the assignment, which was described as follows:

> He was expected to and did prepare lesson plans, prepare and secure instructional materials, grade students, meet with parents, maintain attendance and discipline records, and perform the other duties required of regular classroom teachers. Appellant was paid during the first 30 days he held this position as specified by the collective bargaining agreement—at the rate of $35 per day without fringe benefits or retirement benefits. Thereafter, appellant was compensated as a regular classroom teacher.[50]

The parties agreed that the teacher had full responsibility for the assignment. The Commission ruled that he had been demoted under the criteria set out in *Weidman*.

The Commission's full responsibility test was rejected by the Ingham County Circuit Court,[51] which found a decision in a New York case[52] to be more persuasive. In considering whether a laid-off tenured teacher had a right to be appointed to a position opened by a leave of absence, the New York Court of Appeals had stated:

> Under the circumstances of this case, however, we think it fair to conclude that the position at issue was not "vacant." The term 'vacancy' when used in this context connotes a position or office for which there is no incumbent. Viewed in this light, it is evident that the term does not encompass a position that is temporarily open because the present incumbent has taken a short-term leave of absence.Indeed, it would be somewhat anomalous to treat a position as though it were "vacant" when there exists an incumbent who has a clear right to reclaim the position upon return from his leave.[53]

In its *Weidman* decision, the Circuit Court ruled that there cannot be a vacancy when a position is only temporarily open due to a short-term leave of absence and there is an incumbent who has a right to return to the position. Shortly thereafter, the Tenure Commission, in a private case, gave its interpretation of the Circuit Court's decision:

> Clearly, the Circuit Court [in *Weidman*] was of the view that a teacher beset by illness may return to his or her former assignment as soon as health permits. We do not reject this premise. Thus, the practical difficulties in holding that an on-going illness may create a vacancy should not be ignored. At some point, the interest in a clear, certain standard becomes paramount.Controlling boards have a legitimate interest in knowing, while making their initial staffing decisions, whether or not the Tenure Act mandates a

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[49] TTC 83-5.

[50] Id. at 2.

[51] Weidman v. Brandon Sch. Dist. No. 83-386911-AA, Circuit Court, Ingham County (April 16, 1984).

[52] Brewer v. Bethpage Central Sch. Dist., 433 N.Y.S.2d 1009, 414 N.E.2d 389 (1980).

[53] Id. at 1011, 414 N.E.2d at 391.

> recall. For example, a school district may initially employ a substitute, only to learn that the absence will probably last long enough to require a recall. Under *Weidman*, then, the district dutifully recalls a tenured teacher. If the on-staff teacher unexpectedly recovers his or her health shortly thereafter, the district must then make more staffing decisions, possibly lay-off decisions, and cope with the probability that the educational process will be disrupted yet again. For this reason, we hold that an on-staff teacher's continuing, day-to-day absence does not create a vacancy for purposes of recall under the Act. To the extent that this holding conflicts with the holding and rationale of the Commission's decision in *Weidman*, *Weidman* is overruled.[54]

The Commission's initial definition of vacancy in *Weidman* was also overruled by the Michigan Court of Appeals.[55] In rejecting the Commission's full responsibility test, the Court adopted the view of the Circuit Court:

> The term "vacancy" has traditionally been considered in reference to an office which is unoccupied by a legally-qualified incumbent who has a right to continue therein. The meaning of "vacancy" is found in 1851 PA 172, as amended, MCL 201.3; MSA 6.693, in effect at the time the Teacher Tenure Act was enacted. This statute enumerates events giving rise to a vacancy in office, which include death, resignation, removal from office, or a decision of a competent tribunal declaring void an appointment. These events involve the removal of the legal right of the incumbent to occupy the office. . . The determination of whether a vacancy exists is based upon whether there exists someone with a right to the position. The teaching position left open by a teacher on sick leave in excess of six weeks is *unoccupied* but cannot be considered *vacant* as long as the incumbent teacher has the right to return to that position. A teacher on sick leave does not vacate the position with the school district as long as the teacher has a right to return. Pursuant to MCL 38.112; MSA 15.2012, teachers on sick leave do not terminate their continuing tenure status because they have a right to return and reclaim the position they left temporarily.[56]

The Court of Appeals criticized the Commission's use of the full responsibility test:

> The teaching position left open during M. Vaughn's sick leave of itself did not create a "vacancy" within the meaning of the statute. The responsibilities and duties which the teacher who filled this position had to assume during Ms. Vaughn's absence is not determinative of whether a "vacancy" occurred.[57]

These decisions make it clear that a vacancy does not exist when there is an incumbent who has a right to return to the position.

After the Court of Appeals decision in *Weidman*, the Commission abandoned its full responsibility test. In *Carpenter v. Lakeshore Public Schools*, the Commission held that "positions temporarily open due to short term leaves of absence where the incumbent has a right to return to the position are not vacancies for the purposes of recall under Article IV, Section 5 of the Tenure Act."[58] In *Symington v. Pinckney Public Schools*,[59] the Commission expressed its concern about the practical difficulties in holding that an on-going illness may create a vacancy. "Practical difficulty" was described in *Symington*:

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[54] Private Case cited in Carpenter v. Lakeshore Public Schs., TTC 83-79 at 4-5.

[55] Weidman v. Brandon Bd. of Educ., 143 Mich. App. 207, 371 N.W.2d 910 (1985).

[56] Id. at 211, 371 N.W.2d at 912, quoting from Circuit Court opinion.

[57] Id. at 212, 371 N.W.2d at 913, quoting from Circuit Court opinion.

> Robert Nakoneczny, administrative assistant in charge of personnel and general administration, testified that, at the time of Mr. Burg's accident, no one knew how severely he was injured. When Nakoneczny subsequently talked to Burg in the hospital a week after the accident, Burg told him he would be back within a couple of weeks. Nakoneczny subsequently received periodic assurances from Burg that he would be returning to work shortly, that the only problem involved drainage of his leg wound, and that he was merely waiting for his doctor's clearance to return to work. Mr. Burg was not able to provide a doctor's statement that he was ready to return to work until April 1.[60]

The Commission determined in *Hoert v. South Redford School District*[61] that if it had applied its full responsibility test, appellant would have been recalled to a position that was vacant because of the prolonged and continuous illness of an on-staff teacher. The absence of one teacher (due to illness) began on September 28, 1981, and continued throughout the school year. The other absence, due to a teacher's injury in an automobile accident, began on November 13, 1982, and except for a three-week period, continued for the remainder of the school year. The Commission held that neither position constituted a vacancy that mandated the recall of laid-off tenured teachers. Similarly in *Marshall v. Melvindale-Northern Allen Park Public Schools*,[62] the Commission held that a vacancy requiring mandatory recall had not been created when a teacher was absent from January 1983 through March 15, 1984.

Part-time Positions

A vacancy for purposes of recall includes part-time positions.In *Federspiel v. Meridian Public Schools*,[63] the Commission held that a tenured teacher who has been laid off from a full-time position is entitled to reinstatement in a part-time position if the duties of the two positions are similar. Alternatively, a teacher whose full-time position has been abolished is entitled to preference for appointment to a vacancy that occurs in a similar position, whether part-time or full-time. In *Federspiel*,[64] the Commission determined that it had implicitly recognized in a prior decisions that a teacher had a right to be recalled to a part-time position.

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[58] TTC 83-79 at 5. *accord*, Brown v. Algonac Community Schs., TTC 83-35-2, where 12 week maternity leave of absence did not create a vacancy: and Billups v. Howell Public Schs., TTC 82-79, where absence due to heart attack from March until the end of the school year did not create a vacancy.

[59] TTC 82-82.

[60] Id. at 4.

[61] TTC 83-7.

[62] TTC 84-1.

[63] TTC 81-71.

In *Lee v. Garden City School District*,[65] the Tenure Commission held that a conversion of a "half-pay" to a "full-pay" position does not create a vacancy for purposes of recall. In this case, the district had implemented a negotiated Early Retirement Incentive (ERI) program. Retirees were to receive one-half their former salary and replacement teachers were to be paid from the remaining portion. Laid-off teachers, according to seniority and certification, were offered the first opportunity to replace the ERI teachers.Teachers Lee and Lasceski, who were on layoff, declined the half-pay positions offered to them, but other less-senior teachers (Taylor, Lattin, and Sekulich) accepted the ones offered them. The next year, these teachers' half-pay positions were converted to full-pay positions. Lee and Lasceski argued that when these three half-pay positions were converted to full-pay positions, they should have been recalled.

The question before the Commission was whether vacancies were created when the half-pay positions held by Taylor, Lattin and Sekulich were converted to full-pay positions. In holding that they were not, the Commission stated:

> We do not believe that a vacancy, as this Commission has defined that term, occurred when the "half-pay" teacher shifted to full-pay status. Because the positions which appellants claimed were filled at the time appellants contend they became entitled, the tenured teachers already in those positions were incumbents who were entitled to keep their jobs. Hence, no vacancy arose at that time.[66]

Qualifications

The purpose of this section is to summarize the interpretations of the court and the Commission of the term qualification as it applies to layoff and recall issues arising under the Teachers' Tenure Act. Article IV, Section 5 of the Tenure Act provides:

> Any teacher on permanent tenure whose services are terminated because of a necessary reduction in personnel shall be appointed to the first vacancy in the school district for which he is *certified* and *qualified*.[67]

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[64] *Accord*, Hendges v. Oak Ridge Schs., TTC 80-29.

[65] TTC 82-87 and TTC 82-88.

[66] Id. at 7.

[67] MCLA 38.105, MSA 15.2005 (emphasis added).

The legislature meant that both the certification[68] and the qualification of a tenured teacher are to be considered when layoff and recall are involved. A controlling board is under no obligation to set out qualifications.[69] However, if no qualification standards are established, a tenured teacher's right to recall is based solely on his certification.[70]

Definitions of certified and qualified are crucial to resolving layoff and recall disputes. The Commission has stated:

> [C]ertification and qualification are separate and distinct concepts. Certification represents the basic, minimum level of competency necessary to permit an individual to teach in this state. School boards are obligated by statute to employ certified teachers, (MCLA 380.1233; MSA 14.41133). As such, we must conclude that certification must be the threshold consideration in selecting a teacher for any position. Further, while determination of qualification is provided for as an adjunct to certification in the selection process, qualification cannot and does not supercede the basic requirement of certification. Indeed, when, as here, a school board chooses between a qualified but uncertified individual and a certified tenured teacher, not qualified according to board standards, compliance with certification requirements must prevail.[71]

The State Board of Education has the duty and power to determine the requirements for and issue all licenses and certificates for teachers in the public schools.[72] The State Board of Education's teacher certification requirements are set forth in the Department of Education publication *Certification Manual for School Officials* (June 1975) and in the *Teacher Certification Code*.[73] Whether or not a teacher is properly certified is not subject to local board discretion.[74]

When a controlling board utilizes qualification standards in selecting teachers for layoff and recall, it must follow specific guidelines, which are discussed below.

Definition and Purpose

In his concurring opinion in *Anderson v. Harper Woods Schools*, Justice Cavanagh stated:

> It is unfortunate that nowhere does the tenure act define the term "qualified" nor does the act indicate the means by which the statutory preference for tenured teachers is to be implemented.[75]

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[68] For definition of certification as used in the Tenure Act, see Chapter II.

[69] Arnold v. New Haven Community Schs., TTC 79-11.

[70] Farmer v. Holton Public Schs., TTC 78-52.

[71] Rogers v. Clio Area Schs., TTC 81-78 at 11.

[72] MCLA 380.1531, MSA 15.41531.

[73] 1973 AACS, R 390.1101 *et seq*.

[74] However, under the State Department of Education Teacher Certification Unit's policy, the ultimate responsibility for determining what type of certificate a teacher in an "alternative education program" is required to hold devolves upon the employing school board. Bode v. Roseville Bd. of Educ., TTC 80-46.

[75] 74 Mich. App. 227, 231, 253 N.W.2d 718, 720 (1977).

The term "qualified" as it appears in the statute refers to standards determined by the local board that exceed the statutory requirements for certification. Using selection criteria serves to ensure that a teacher's qualifications for a position will be weighed only against some definite minimum standard. A qualification standard 1) is the controlling board's delineation of those essential attributes it believes an individual must have to perform a particular teaching assignment; 2) must meet some educational objective; and 3) should be reasonably calculated to increase the likelihood that the selected candidate will succeed in the assignment.[76]

In establishing qualifications, a board must remember that a certified and qualified tenured teacher must be offered an open position ahead of probationary teachers, regardless of the superior qualifications that the probationary teachers may have.[77] The Commission has held that "tenured teachers seeking recall are not in competition with new hirees or probationary teachers."[78]

Reviewing decisions about the reasonableness and application of qualifications established by an local board of education is a function of the Tenure Commission. This approach, the Commission held, "has the advantage of maintaining a degree of local control over the schools, while requiring boards to make their rehiring determinations within an established framework using uniform standards."[79]

Promulgating Qualification Criteria

Until recently, the Tenure Commission held that qualification standards, if used, must be predetermined, written, formally adopted, and promulgated before screening of teachers eligible for return begins.[80] The Commission held further that standards should be formalized by the time the vacancy opens. The Tenure Commission and the courts have been at odds over the Commission's policy.

In addressing the issue of when qualification standards must be promulgated, the Commission held in *Farmer v. Holton Public Schools* that:

> [T]he standards used to make the determination must be defined before any screening of certified tenured teachers is commenced. We find that the very latest a school board can validly devise qualification standards is when a vacancy occurs. Accordingly, we conclude that the Teachers' Tenure Act does not permit a local controlling board to deny recall of a tenured teacher under MCLA 38.105 to the first vacancy for which he or she

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[76] Chester v. Harper Woods Sch. Dist., 87 Mich. App. 235, 273 N.W.2d 916 (1978); Holton Public Schs. v. Farmer, 77 Mich. App. 765, 259 N.W.2d 219 (1977).

[77] Krantz v. Imlay City Community Schs., TTC 81-5; Arnold v. New Haven Community Schools, TTC 79-11; Farmer v. Holton Public Schs., TTC 78-52.

[78] Farmer v. Holton Community Public Schs., TTC 78-52 at 7.

[79] Holton Public Schs. v. Farmer, 77 Mich. App. 765, 774, 259 N.W.2d 219, 225 (1977).

[80] Cammin v. Saginaw Tp. Community Schs., TTC 81-1; Bavido v. Benton Harbor Area Schs., TTC 81-6; Arnold v. New Haven Community Schs., TTC 79-11; Hendges v. Oak Ridge Public Schs., TTC 80-29; Barnes v. Bridgeport-Spaulding Sch. Dist., TTC 79-46; Farmer v. Holton Public Schs., TTC 78-52.

> is certified on the grounds that the tenured teacher is not qualified, unless the controlling board has formulated a standard on which it can base its decision as to whether or not a teacher possesses the minimum qualifications for the vacancy in question.[81]

The Commission's decision in *Farmer* was reversed by the Muskegon County Circuit Court,[82] which held that the Commission's determination that qualifications be written was not only incorrect but also an improper attempt to legislate. After the Circuit Court's decision, the Commission continued to adhere to its promulgation policy and voiced its disagreement with the Court's decision, stating:

> We have reviewed the opinion of the court and cannot agree with its conclusion on the issue of written qualifications.The Act and its purpose and boards and teachers who must operate under its strictures, are better served by requiring that the qualifications applied on a return from a necessary reduction in personnel be reduced to writing and formally adopted by the board. The *Chester* court required that the qualifications be "promulgated." This term promulgated is defined as, "To publish; to announce officially;. . ." Black's Law Dictionary, 4th Rev. Ed., 1968, p. 1380. Without written qualifications, officially adopted by the Board as reflected in its minutes, *Travener v Elk Rapids Schools*, 341 Mich 244 1954}, or through the provisions of an executed collective bargaining agreement with the teachers' bargaining agent, there are no qualifications. We interpret the *Chester* decision to mandate that a board desiring to apply criteria other than the certificate held, when returning teachers from a necessary reduction in personnel, do so by adopting and setting forth in writing the qualifications it will apply prior to the inception of the screening process through which teachers will be returned.[83]

But in *Baszler v. Pellston Public Schools*, the Commission stated:

> This Commission has long held, however, that controlling boards bear the burden of showing promulgated qualification standards. Moreover, such standards must be written, adopted by the board, and promulgated prior to the screening process. In the absence of properly promulgated qualification standards, qualification for a particular position is based solely on certification.[84]

In another decision, the Tenure Commission delineated some of the obligations of a controlling board that desires to promulgate standards:

> Boards that wish to consider qualifications beyond certification when reappointing teachers terminated due to necessary reduction in personnel must promulgate, by written board policy or by the adoption of provisions in a collective bargaining agreement, standards regarding the qualifications of such teachers. These qualification standards are applicable in necessary reduction in personnel situations (layoffs) and in a return from a necessary reduction in personnel situation (recall). The promulgated qualifications may allow for exceptions to, or departures from, the criterion set out by

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[81] TTC 78-52 at 8.

[82] Farmer v. Holton Public Schs., No. 79-13364-AA, Circuit Court, Muskegon.

[83] Arnold v. New Haven Community Schs., TTC 79-11, footnote at 9-10.

[84] TTC 81-77 at 13.

the board, as in the instant "mutual consent" clause. However, for the exceptions or departures to be in compliance with the Act, the standards to be applied in permitting such exceptions must also be promulgated.[85]

The Circuit Court's decision in *Farmer* was appealed to the Michigan Court of Appeals, which affirmed the Circuit Court's decision and rejected the Commission's qualifications policy. The Court determined that the Commission had erred in relying upon the proposition in *Chester v. Harper Woods School District*[86] that before a qualification may be valid, it must be established and promulgated by the school board. The court stated:

> We agree with the trial court's conclusion that the tenure commission has overstepped its statutory authority. . . .
>
> . . . .
>
> The present system of review is sufficient to enforce this section of the tenure act and there is no need to place upon a school board an affirmative duty of publishing teacher qualifications a duty that has not been authorized by statute. Furthermore, plaintiff's and the commission's reliance on this Court's decision in *Chester v Harper Woods School Dist*, 87 Mich App 235; 273 NW2d 916 (1978), for the proposition that standards must be reduced to writing prior to receiving applications for teacher vacancies is without foundation. In *Chester*, as here, the school had not promulgated written minimum standards. If this Court intended to require that the criteria for teacher qualifications be established in the manner suggested by the commission, it was presented with the opportunity to so hold and could have specifically stated so. However, it did not.
>
> The tenure commission should have reached the question of whether the criteria employed by defendant were themselves arbitrary and unreasonable. Although the commission could not supplant the school board's criteria on its own, this was held to be a proper area of inquiry in *Chester*.[87]

In a subsequent decision, the Court of Appeals stated:

> We do not read *Chester* as requiring such procedural formalities. Rather, the *Chester* Court held that the state tenure commission, in determining whether a tenured teacher is qualified for a position, must apply the criteria of qualification that the school board has set out, unless those criteria are arbitrary, unreasonable or promulgated in bad faith. The commission must give deference to a school board's determination of qualification, and may not substitute its own criteria of qualification for those of the school board. Indeed, the qualification criteria upheld in *Chester* had not been reduced to writing, and thus not promulgated. The state tenure commission has no authority to require that school boards reduce qualification criteria to writing.[88]

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[85] Dowling v. Portland Public Schs., TTC 80-48 at 5 (citations omitted).

[86] 87 Mich. App. 235, 173 N.W.2d 916 (1978).

[87] Farmer v. Holton Schs., 138 Mich. App. 99, 103-104, 359 N.W.2d 532, 534 (1984). This decision was first issued in an unpublished opinion, Court of Appeals Docket No. 52189 (June 10, 1981). The Commission took the position that an unpublished *per curiam* opinion carried no precedential value. Thereafter, the Court of Appeals decided to publish its *Farmer* decision.

[88] Portland Public Schs. v. Dowling, 138 Mich. App. 824, 827-28, 360 N.W.2d 315, 317-18 (1984).

Following the court's decisions in *Farmer* and *Dowling*, the Commission held in *Hoard v. Crestwood School District* that the board's "requirement that a librarian hold a master's degree in reading or library science is not invalid merely because appellee did not formally adopt it or reduce it to writing."[89] The Commission noted, however, that its decision would not serve to prohibit its review of the validity of qualification standards.

Burden of Proof

If a controlling board asserts that it has used qualification standards to select teachers for layoff or recall, it bears the burden of proof as to what qualifications it used and how it applied them in assessing the suitability of the teachers in competition for the vacancy.[90] This burden can be met without showing the formal board action of adopting the standards or proving that the standards had been reduced to writing. The board's position would be improved, of course, if it could show that it had taken formal action to adopt the standards prior to the selection process.

After the controlling board has met the burden of showing that its qualification criteria are not arbitrary, capricious, and promulgated in bad faith and that they were applied properly, the teacher who has not been recalled must then show that he is in fact more qualified than the teacher retained.[91]

A board's responsibility to determine the qualifications for layoff and recall purposes cannot be delegated. In *Bavido v. Benton Harbor Area Schools*, the Commission found that it was improper for a school board to enforce qualifications criteria that had been established by the administrative staff:

> [T]he board delegated the responsibility for formulating those standards to the administration. Once the administration had accomplished that task, the board took no action to assure the qualifications imposed by the administration met the needs and expectations of the district. The delegation of that authority, without subsequent board review and approval, was improper.[92]

A board does not violate the Tenure Act however, by delegating to an advisory or selection group the duty of formulating qualifications for a position, as long as the board approves those qualifications.[93]

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[89] TTC 82-25 at 4. The Commission stated that "—Chester and its progeny make it clear that this Commission is empowered to reject qualification standards set out by a controlling board if the standards are arbitrary or capricious."

[90] Paeth v. Montague Area Public Schs., TTC 80-33; Arnold v. New Haven Schs., TTC 79-11.

[91] Wogerman v. Branch Intermediate Sch. Dist., TTC 81-42; Stevens v. Sch. Dist. of Harper Woods, TTC 81-19; Paeth v. Montague Area Public Schs., TTC 80-33.

[92] TTC 81-6 at 4.

[93] Hendges v. Oak Ridge Public Schs., TTC 80-29.

Revised Standards

A board of education may adopt new, more stringent qualification standards and begin to apply them, but it may not do so retrospectively.[94] This interpretation of the Tenure Act prohibits a board from adopting criteria that would disqualify an on-staff teacher who has been performing satisfactorily. This is illustrated below:

> [W]e find no merit in appellee's assertion that appellant was not qualified to teach vocal music because he had neither a major nor a minor in the subject. It is true that appellant lacked even a minor in vocal music. We find, however, that beginning in the 1977-78 school year, appellant was assigned to teach chorus and general music at the Middle School. By the 1979-80 school year, appellant's general music classes focused largely on vocal training and his duties even included presentation of a performance at the end of the year. In addition, we find that the principal rated appellant satisfactory throughout this time. Thus appellee takes the untenable position of having employed appellant in an assignment which appellee now claims he was unqualified to hold. We conclude that appellant was qualified to teach vocal music.[95]
>
> We find nothing in the Tenure Act which would prohibit a controlling board, acting in good faith, from promulgating a new more stringent qualification standard which would have prospective application only. Indeed, we would scrutinize closely adopting of new qualification standard which 'disqualified' teachers already performing satisfactorily from continuing in their current assignments, particularly in the absence of an ample grace period.[96]

The question of whether a board can adopt new qualification standards that would prevent the recall of a teacher, however, remains open. In *Farmer v. Holton Public Schools*,[97] the Commission expressed its concern that a tenured teacher's right to be recalled could be circumvented if a controlling board were allowed to apply different standards of competency to each individual applicant.

Tenure Commission's Role

It is not the Commission's function to establish the standards for qualifications and to determine which tenured teachers best meet the standards. The Tenure Commission cannot substitute its judgment for that of the controlling board in this area. In *Chester v. Harper Woods School District*, the Court stated:

> [T]he Tenure Commission] may no more redefine the criteria of "qualification" set by the board than outline new standards of "certification" for the state. To set the parameters of qualification to fill vacancies is a function of the school board which may not be usurped by the tenure commission. It is a legislative rather than a quasi-judicial function.

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[94] Hoard v. Crestwood Sch. Dist., TTC 82-25; Rogers v. Clio Area Schs., TTC 81-78.

[95] Hoard v. Crestwood Sch. Dist., TTC 82-25 at 7-8.

[96] Rogers v. Clio Area Schs., TTC 81-78 at 9.

[97] TTC 78-52.

> In our opinion, construction of the tenure law in harmony with the expressed legislative policy to protect teachers from arbitrary and unreasonable practices does not permit a construction so liberal as to entirely destroy the right of a local board to independently determine matters of policy in the administration of local school affairs. . . . To further expand the jurisdiction of the commission would be to render it the legislator of all teacher qualification at the expense of local control. If the Legislature intended to deprive local governing bodies of legislative control over teachers' qualifications, that intent should have been definitely stated in the tenure act.[98]

In this case the Court of Appeals rejected the Commission's attempt to equate years of teaching experience with qualifications, stating:

> The majority of the commission completely disregarded this basis (the board's) in favor of its own. Without ever considering whether the criteria adopted by the board was arbitrary, unreasonable or promulgated in bad faith, the majority erroneously chose to view qualification purely from a perspective of teaching experience. Indeed its opinion is replete with reference to 'new hires'. For example, with regard to Mr. Chester they state: 'The two English vacancies in dispute were filled by two newly hired, newly graduated teacher. Surely Chester was at least as qualified as a new hiree who had no teaching experience.[99]

Judge Simon described, in *Chester*, the proper role of the Tenure Commission in reviewing the school board's application of its qualification criteria:

> [I]n reviewing the determination of a school board that a tenured teacher is not qualified for an available position the tenure commission is constrained to apply the criteria of qualifications set out by the school board unless that criteria itself is either arbitrary, unreasonable of promulgated in bad faith.[100]

Rulings

Before the Tenure Commission can consider whether assignments were juggled or course offerings manipulated by the local board in order to lay off tenured teachers or prevent their recall, it must first be determined whether the school board's criteria for qualification are arbitrary, unreasonable, or promulgated in bad faith. If the Tenure Commission decides that the board's criteria are acceptable, it may then review whether the complaining teachers either are qualified for any of the present vacancies or would have been qualified had no rescheduling occurred. The Commission has had a number of opportunities to rule on whether qualification standards have been arbitrary, unreasonable or made in bad faith.

A controlling board may design a qualification standard for a specific position;[101] the criteria need not be applicable to every position in the district. In *Rogers v. Clio Area Schools*,[102] the controlling board had adopted a specific qualification standard for art teachers. The Commission found this to be a valid exercise of the board's authority under the Tenure Act. In *Krantz v. Imlay City Community Schools*,[103] the Commission found that the board had promulgated separate and specific qualification standards for virtually every instructional and administrative assignment in the district. These separate standards were found to be valid.

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[98] 87 Mich. App. 235, 245, 273 N.W.2d 916, 920 (1978).
[99] Id. at 247, 273 N.W.2d at 921.
[100] Id. at 246, 273 N.W.2d at 920.
[101] Hendges v. Oak Ridge Public Schs., TTC 80-29.
[102] TTC 81-78.

The Tenure Act does not prevent a controlling board from negotiating the qualification standards with the teachers' bargaining agent. However, the incorporation of the criteria in a collective bargaining agreement does not remove the Commission's limited authority to review the controlling board's decisions regarding qualifications.[104]

The question has arisen whether a board may waive or make exceptions to established qualification standards. In *Dowling v. Portland Public Schools*,[105] the school board's qualification criteria required, among other things, that teachers have a minor in the field of study they would be teaching. Dowling needed a minor in mathematics, therefore, to be deemed qualified for the disputed position in mathematics. However, the board's qualification criteria also allowed deviations from the rule based on "mutual consent." The school board had never promulgated any standard delineating when it would consent to a deviation; nevertheless, it did frequently consent. The Commission found that the board's basis for consenting to placement of otherwise unqualified teachers varied widely from case to case. The Commission stated:

> Under this exception (mutual consent), appellee can, and has, assigned teachers outside their area of major or minor study and outside their area of certification. Without proper guidelines to determine when it can be applied, the exception becomes wider than the general rule itself.The exception allows the controlling board to ignore its qualifications standards whenever it chooses to do so. . . . We must conclude that the mutual consent exception is inextricably tied to and materially affects the remaining qualification standards.Further, we conclude that the arbitrary nature of exception taints the entire qualification standards.We hold that appellee's qualification standard, as set out in the policy quoted above, does not satisfy the test set out in *Chester v Harper Woods School District*, 87 Mich App 235 (1978), which requires that a school board's qualification standards be neither arbitrary nor capricious. In the absence of valid qualification standards, a tenured teacher who is certified for the assignment is entitled to placement in that position.[106]

The board appealed the Commission's decision to the Circuit Court, which rejected the Commission's position. The Court of Appeals affirmed the Circuit Court.[107] In reference to the "mutual consent" exception the Court of Appeals stated:

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[103] TTC 81-5.
[104] Arnold v. New Haven Community Schs., TTC 78-11.
[105] TTC 80-48.
[106] Id. at 4-5.
[107] Portland Public Schs. V. Dowling, 138 Mich. App. 824, 360 N.W.2d 315 (1985).

> The portion of the policy relating to mutual consent recognized that a person may be qualified to teach a subject outside his or her major or minor field of study, but the existence of such qualification would have to be established on a case-by-case basis to the satisfaction of both parties.[108]
>
> . . . .
>
> The "mutual consent" clause allows plaintiff to apply criteria other than certification and the major or minor field of study, such as extensive course work at the undergraduate level not resulting in a major or minor, in determining a teacher's qualification. The "mutual consent" clause is neither more nor less arbitrary than the underlying criteria used in determining whether to give that consent.[109]

The Court found that the board had not applied its qualification criteria arbitrarily and capriciously. The court stated:

> A close reading of *Chester v Harper Woods School District, supra*, indicates that the proper inquiry for the tenure commission to make is to determine whether or not a school board *acted* arbitrarily, unreasonably, or in bad faith in setting the standard. If the school board did not so act, its criteria must be used. The record does not support a conclusion that plaintiff acted arbitrarily, unreasonably, or in bad faith in adopting the "mutual consent" clause.[110]

In *Krantz v. Imlay City Community Schools*,[111] the district established a qualification standard requiring at least one year of experience at the elementary level in the last five years of teaching for placement in an elementary teaching position. The board adopted this standard because administrators feared that inexperienced high school teachers with more seniority would acquire elementary certification and seek elementary school positions. The Commission held that the requirement was reasonably calculated to ensure that the educational objectives would be achieved.

A controlling board may rely on state-mandated criteria that exceed mere certification in order to be eligible for special funding. In *Tomiak v. Hamtramck School District*,[112] the Commission found that eligibility for funding under Title I, Compensatory Education Grants, was dependent upon hiring of a certified teacher who had completed a minimum of 6 hours of college level courses in reading. The fact that the reading instruction requirement was mandated by the state permitted the controlling board to use it despite the fact that the board had not promulgated the requirement.

Appropriateness of Qualification Standards

On a number of occasions the Tenure Commission has ruled that qualification standards are inappropriate.

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[108] Id. at 828, 360 N.W.2d at 318.
[109] Id. at 832, 360 N.W.2d at 319-320.
[110] Id.
[111] TTC 81-5.
[112] TTC 80-54.

In *Six v. Muskegon Board of Education*[113] a negotiated provision in the collective bargaining agreement allowed the board of education to designate four positions within the bargaining unit as being exempt from layoff. Under this exemption, the board exempted a probationary teacher while terminating a tenured teacher who was certified and qualified for the position. The Commission found that the negotiated qualification standard could not apply to retention of a probationary teacher in favor of a tenured teacher. It was found not to be sufficient, under the Tenure Act, to serve as the qualification standard. The Commission stated:

> [A] contractual exemption from layoff conferred upon a probationary teacher is impermissible under the Teachers' Tenure Act, where the exemption acts to deny placement in the position held by the probationary teacher to an otherwise certified and qualified tenured facing layoff.[114]

In this case the board had linked coaching duties to a full-time physical education position and treated the combination as one position. The Commission ruled that a controlling board may not use qualification for an extra-duty assignment as a bar to employment of a tenured teacher who is certified and qualified to assume the regular teaching assignment. The Commission based its decision on the interpretation of an amendment to Article III, Section 1 of the Teachers' Tenure Act which says "Continuing tenure shall not apply to an annual assignment of extra duty for extra pay."[115] The Commission stated:

> The plain language of the amendment shows that the legislature intended to remove extra duty assignments from the force of the Tenure Act altogether. Thus, the amendatory provision allows a controlling board to remove a teacher from an extra duty assignment without cause, and without declaring a necessary reduction in personnel. Similarly, we conclude that the amendment allows a teacher to refuse an extra duty assignment without fear of censure. Therefore, by linking the qualifications for the extra duty assignment to the regular teaching assignment, appellee presumes it has the authority under the Teachers' Tenure Act to require that a particular teacher perform the extra duty assignment. We do not believe that this provision of the Act can or should be construed in the manner in which appellee's position would require.[116]

In *Garza v. Taylor School District*[117] the board had followed a practice of recommending for teacher consultant approval only those teachers with certification for teaching learning disabled or educable mentally impaired students. Teachers whose certificates authorized them to teach emotionally impaired students, but who lacked certification in any of the cognitive disability areas required by the district for teacher consultant status, were laid off. These teachers argued that the board's practice denied them the right to use the district's "bump and bid" process to maintain their employment. After reviewing the board's reasons for establishing its criteria for teacher consultant approval, the Commission determined that the qualification standard was valid because it had been consistently applied and was reasonably calculated to increase the likelihood that the selected candidate would succeed in the assignment.

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[113] TTC 81-17.
[114] Id. at 11.
[115] MCLA 38.91, MSA 15.1991.
[116] Six v. Muckegon Bd. of Educ., TTC 81-17 at 13.
[117] TTC 82-53.

A controlling board may adopt seniority as a qualification standard for determining priority among tenured teachers in layoff and recall situations.[118] In *Kimichik v. Rudyard Area Schools*,[119] the teacher contended that seniority is an implicit right under the Teachers' Tenure Act. Its purpose is to resolve any conflicts that arise between tenured teachers competing for a vacancy. The Commission noted that previously in *Defrain v. River Rouge School District*, it had held that "seniority is a right solely by contract" and "that the subject of seniority is to be a subject of mandatory bargaining."[120] In *Kimichik*,[121] the Commission held that "a school board's failure to accord preference to the teacher with greater seniority when recalling tenured teachers following a necessary reduction in personnel does not violate rights protected by the Teachers' Tenure Act."[122]

The Tenure Act does not provide for relative tenure rights between two tenured teachers. A teacher's claim that he has more tenure than another tenured teacher is unfounded. In *Stone v. Fraser Public Schools*, the Commission stated that "tenure is not quantifiable. Rather it is a status attained by an individual teacher in a district upon successful completion of a probationary period."[123]

A controlling board of education may consider demonstrated job competency when considering which teacher to lay off. Evaluations are clearly an indication of a teacher's ability to function in the job. In *Wogerman v. Branch Intermediate School District*,[124] the Commission cited a prior ruling in *Chester v. Harper Woods Public Schools*, that demonstrated job competency is a proper qualification standard,[125] and another in *Dowling v. Portland Public Schools* that there "was nothing wrong with weighing the teacher's abilities against the demands of the job to be performed."[126]

In *Wogerman v. Branch Intermediate School District*,[127] the Commission held that a qualification standard that required a teacher to maintain a pleasant working relationship with associates was relevant to teaching because it was related to a teacher's overall ability to perform.

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[118] Arnold v. New Haven Community Schs., TTC 79-11; Maciak v. Center Line Public Schs., TTC 78-18.

[119] TTC 78-29.

[120] TTC 77-29 at 6; *accord*, Savel v. Roseville Sch. Dist., TTC 78-48.

[121] TTC 78-29.

[122] Id. at 4.

[123] TTC 84-38 at 4.

[124] TTC 81-42.

[125] TTC 73-64-R.

[126] TTC 80-48 at 7.

[127] TTC 81-42; *accord*, Beebee v. Haslett Public Schs., 66 Mich. App. 718, 239 N.W.2d 724 (1976); Niemi v. Kearsley Community Sch. Dist., TTC 74-36.

In *Smith v. Wyoming Public Schools*,[128] the Court of Appeals affirmed a Circuit Court decision (which had reversed a Commission decision)[129] and ruled that use of a teacher's former leave status as a qualification standard was permissible. The Commission had determined that the controlling board of education had improperly failed to consider a teacher who had been on leave of absence in its pool of actively employed teachers. Had the board considered her, it would not have terminated her services. It was the Commission's opinion that the use of the standard of former leave status denies teachers returning from leave the same rights to reemployment and placement as teachers who have not taken a leave of absence. The Commission cited its prior decision in *Bebeau v. Van Dyke Public Schools*, where it stated:

> In *Freiberg v Board of Education of Big Bay de Noc School District*, 61 Mich App 404; 232 NW 2d 718 (1975), the Court held that the provision of the Teacher's Tenure Act allowing local controlling board's to make necessary reduction in personnel must be interpreted in light of the purpose of the Act of protecting teachers rights. To allow the creation of a sub-class based on previous leave of absence status with respect to recall rights would undermine the stated purpose of the Act. We note that if Appellee Board's policy was permitted under the Act, teachers returning from leave of absence could very well be forever precluded from reemployment. We can find no justification under the Teachers' Tenure Act for Appellee Board's differential treatment of Appellant's recall rights.[130]

The Commission was concerned that a controlling board could legally circumvent a teacher's rights to continuing employment based upon his or her acceptance of a benefit protected by the Tenure Act. In addition, the Commission cited MCLA 38.112, MSA 15.2012, which provides, "[N]o leave of absence shall serve to terminate continuing tenure previously acquired under this act." The Commission believed that the use of former leave status would have the practical effect that the statute was intended to prevent.

Disregarding the Commission's logic, the Court of Appeals opined that a "school board's use of certain selection criteria—including former leave status—in its decision to lay off particular tenured teachers does not deprive those teachers of any 'right' to continuing employment."[131] Therefore, a board may use former leave status in deciding to terminate a teacher's services because of economic necessity without violating the Teachers' Tenure Act.

In a more recent decision in *Starrs and Van Houten v. Linden Community Schools*,[132] the Commission considered the "reasonableness" of former leave status as a criterion for selecting teachers for recall. The Commission determined that former leave status does not meet the purpose of qualification standards envisioned by *Chester* and *Farmer* because it has no necessary bearing on a teacher's competence as an instructor or in allocating the economic burden of layoff fairly. The Commission concluded that subordinating the recall rights of teachers fomerly on leave status was unreasonable.

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[128] 128 Mich. App. 746, 341 N.W.2d 202 (1983).

[129] Smith v. Wyoming Public Schs., TTC 80-12.

[130] Id. at 9, citing from Bebeau v. Van Dyke Public Schs., TTC 79-37 at 7.

[131] Smith v. Wyoming Public Schs., 128 Mich. App. 746, 749, 341 N.W.2d 202, 203 (1983).

[132] TTC 82-33-2 and 82-54-2. The Commission's decision in *Starrs* appears to contradict the Court of Appeals decision in *Smith v. Wyoming Schs*.

Recall Obligations and Rights

Reappointment of teachers after a necessary staff reduction is controlled by the Teacher's Tenure Act:

> Any teacher on permanent tenure whose services are terminated because of a necessary reduction in personnel shall be appointed to the first vacancy in the school district for which he is certified and qualified.[133]

Board Responsibilities

A controlling board may not refuse to recall a tenured teacher while a probationary or substitute teacher continues to occupy a position for which the tenured teacher is certified and qualified.[134] A laid-off teacher's right to recall is a right to any position for which that teacher is certified and qualified regardless of whether that position is full-time or less than full-time.[135] In recall situations, a board of education cannot manipulate scheduling and assignments of classes in order to prevent the recall of a tenured teacher.[136] A board may reschedule classes and adjust teaching assignments to accommodate the return of a tenured teacher who has been laid-off, but is it not required to do so.[137]

There is no statutory requirement that a board hold a hearing to determine which teachers are to be recalled from layoff even if a teacher alleges bad faith.[138]

Jurisdiction of Tenure Commission

Because the Tenure Act provides tenured teachers the right to appeal any adverse decision by the local board, questions of recall may be appealed to the Tenure Commission.[139] The Commission has the authority to determine whether the controlling board's conduct constituted bad faith so as to deny a teacher's right to recall. The Tenure Commission has held that a teacher raising a claim of denial of recall bears the burden of showing that a suitable position existed.

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[133] MCLA 38.105, MSA 15.2005.

[134] Hendges v. Oak Ridge Public Schs., TTC 80-29.

[135] Federspiel v. Meridian Public Schs., TTC 81-62.

[136] Wogerman v. Branch Intermediate Sch. Dist., TTC 81-42; Maciak v. Center Line Public Schs., TTC 78-18; Goodrich v. Sch. Dist. of Pontiac, TTC 78-46; Valesano v. White Pine Sch. Dist., TTC 78-47.

[137] Wogerman v. Branch Intermediate Sch. Dist., TTC 81-42.

[138] Freiberg v. Big Bay de Noc Bd. of Educ., 61 Mich. App. 404, 232 N.W.2d 718 (1975); Arnold v. New Haven Community Schs., TTC 79-11.

[139] Freiberg v. Big Bay de Noc Bd. of Educ., 61 Mich. App. 404, 232 N.W.2d 718 (1975).

Teachers' Responsibilities

If a teacher refuses recall because of a contract with another controlling board, he must inform the recalling district, in writing, of the date on which that contract will terminate. The recalling district is then not obligated to consider the teacher for recall until the term of the that contract has ended.

Laid-off teachers who want to be kept on the district's layoff list are responsible for keeping the district informed of their certification status and their address. Teachers, not school boards, are responsible for maintaining their certification status and apprising the district of any changes in it. *Fara v. Coloma Community Schools*[140] illustrates this. Fara held a provisional certificate when she was laid-off in 1979. The certificate expired on June 30, 1981. Fara obtained a continuing certificate but did not file it with the board. She later alleged that the Coloma board had failed to recall her at the commencement of the 1981-82 school year. In rejecting Fara's allegation that she was denied recall, the Commission stated that it believed "that if appellant were still interested in being recalled to Coloma she would have made a point of keeping the district apprised of any changes in certification."[141]

Fara's second mistake was failing to keep the Coloma board informed of her change in address. The Commission stated that "had she truly been interested in retaining her right to future recall with Coloma, [she] would have kept the district informed of her current address."[142] The Commission's decision in *Fara* is consistent with its decision in *Arnold v. New Haven Community Schools*, where it was held that "where the Board has sent notice to the teacher at his/her last known address, the teacher's failure to advise the Board of his/her current residence could bar the teacher's later claim."[143]

Abandonment Recall Rights

A tenured teacher's right to recall survives if he refuses recall because of a conflicting obligation to another school district, or if the recall involves an assignment that is not comparable to the teacher's previous assignment. A board is not obligated to recall teachers who have truly abandoned their recall rights, however.[144] The act necessary to show abandonment is a refusal to respond properly to a recall notice.In order to establish abandonment, the board must show that the teacher overtly acted or failed to act and had a voluntary and total intent to relinquish his recall right.[145] Since a voluntary relinquishment of recall is generally recognized as a waiver of tenure rights, it is essential that abandonment claims be well founded.

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[140] Fara v. Coloma Community Schs., TTC 81-12.

[141] Id. at 4.

[142] Id. at 7.

[143] TTC 79-11 at 9.

[144] Tomiak v. Hamtramck Sch. Dist., TTC 80-54 at 9. "[I]f a controlling board nevertheless finds a teacher's refusal to accept recall improper or unreasonable under our holding here, the controlling board may treat it as an abandonment."

Several Tenure Commission decisions illustrate the problems that teachers and school boards may encounter when teacher intend to relinquish their rights.

Arnold v. New Haven Community Schools[146] illustrates that a board's responsibility to accept a resignation formally. Arnold had submitted a letter of resignation. The board alleged that he had therefore relinquished his recall rights. However, the board had never taken action to accept the resignation. The Commission held that Arnold's offer to resign, evidenced by a letter, was insufficient because the controlling board or its duly authorized agent must give the teacher written acceptance of same in order for the resignation to be effective. Acceptance must be clear, unambiguous, unqualified, and in writing to be enforceable.

In *Fara v. Coloma Community Schools*,[147] the Commission determined that the laid-off teacher, who had been employed in another district (St. Louis), had abandoned her position on the recall list. The teacher had taken the initiative of notifying the board by letter that she was relinquishing her position on the recall list. There had been no offer of a position from Coloma. The teacher's letter is shown below:

> This letter is to inform you that I have accepted a position with the St. Louis Schools and relinquish my position on the Coloma Recall List.

Fara's letter did not state when her contract with the St. Louis Schools was to terminate. The Commission ruled that a teacher refusing recall because of a contract with another controlling board must inform the recalling district, in writing, of the date on which that contract will terminate. Because Fara failed to give the Coloma Board adequate notice of the termination of the St. Louis assignment, the district was relieved of any obligation to recall her.

Conditions Permitting Teachers To Refuse Recall

One issue in layoff and recall matters is whether a teacher's refusal to accept recall extinguishes any statutory right he had to reemployment.

The Commission requires that a controlling board asserting abandonment carry the burden of proving its assertion. This is proper because the Tenure Act carries a presumption that without a knowing, formal, and written resignation, a teacher will continue to render services to the controlling board unless or until action is taken under Article IV or Article V of the Act.[148]

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[145] Purcell v. Ferndale Sch. Dist., TTC 76-56. Decisions involving abandonment claims for reasons other than refusal of recall are discussed in Chapter X.

[146] TTC 79-11.

[147] TTC 82-12.

[148] Paeth v. Montague Area Public Schs., TTC 80-33.

Because a voluntary relinquishment of a teaching position is generally recognized as a waiver of tenure rights, it is essential that abandonment claims be well founded and not merely a subterfuge to deny a teacher his rights. In *Purcell v. Ferndale School District*,[149] the board had held open a position for the teacher. The board requested his performance, but he withheld it. The Commission stated:

> We find where a Board of Education holds a position open for a tenured teacher for which that teacher is certified and qualified, and said teacher refuses to perform after repeated requests for performance, the Board may take appropriate action under Article V, MCLA 38.111; MSA 15.2011.[150]

A teacher is entitled to a hearing before the board of education before his name can be removed from the recall list.[151]

In *Tomiak v. Hamtramck School District*,[152] a laid-off teacher had accepted a position in another school district. The question, therefore, was whether a teacher who has accepted employment in another school district retains his right to recall if he refuses to accept the first vacancy in his original district. The Hamtramck Board asserted that a tenured teacher's future recall rights are dissolved if he refused the first recall, regardless of his reason for refusing. It was the board's contention that the plain language of the Tenure Act unambiguously restricts the right of recall to the *first offered vacancy* for which the teacher is certified and qualified.

The laid-off teacher, Tomiak, argued that the "first vacancy" provision in the Tenure Act should not be construed to limit unduly a tenured teacher's right to reemployment. Rather, he argued, this provision should be construed to enhance the job security the Act was designed to provide to capable teachers. Thus, Tomiak contended, when a tenured teacher states a bona fide, good faith reason—such as obligation to another employer—for refusing recall, his recall right to future vacancies remains undiminished. In ruling for Tomiak, the Commission stated:

> When a tenured teacher's services are terminated due to a necessary reduction in personnel, no controlling board can realistically expect the teacher to remain idle in the hope that a vacancy will occur. As such, appellee's interpretation frustrates the teacher's interest in obtaining employment with another controlling board. Further, the fear that a "laid-off" teacher would resign unexpectedly to accept recall may deter other control-

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[149] TTC 76-56.

[150] Id. at 5.

[151] Tomiak v. Hamtramck Sch. Dist., 138 Mich. App. 644, 360 N.W.2d 257 (1984). The Commission stated that "the Tomiak opinion makes it unclear whether action recognizing voluntary relinquishment of employment or action invoking the forfeiture penalty, or both, require provision of Article IV hearing." Johnson v. Sparta Area Schs., TTC 84-10 at 6.

[152] TTC 80-54.

> ling boards from hiring these capable and experienced teachers. In addition, if a "laid-off" teacher does obtain employment with another controlling board, appellee's narrow reading of "first vacancy" would create an unseemly dilemma for the employing districts and the teacher. If the teacher accepted a mid-year recall, the interim employing district could act to forfeit his or her continuing tenure under the provisions of Article V. Section l; and if the recall was refused, the teacher would lose his or her right to reemployment by the first district. Thus, we conclude that, in view of the basic purpose of the act, a tenured teacher may refuse recall under Article IV, Section 5, because he or she is under contract to another controlling board without relinquishing his or her right to subsequent recall.
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> . . . .
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> The benefit of this privilege of refusal is not without its limits, however. First, the teacher cannot expect to retain his or her right to future recall unless he or she informs the controlling board of the reason for the refusal. Second, we find that refusal of recall alters the district's obligation to the teacher. Once a teacher has refused recall because of a conflicting commitment to another controlling board, the recalling district is no longer required to consider the teacher for recall until the term of the contract has ended. This is analogous to a situation where a teacher seeks reemployment prior to the expiration of his or her voluntary leave of absence. See *Hambouz v Board of Education of the Brandywine Public Schools* (77-46). Moreover, absent a claim of subterfuge in the manner in which the recall was offered, a refusal of recall must logically operate as a waiver of any claim for recovery for failure to recall during the term of the conflicting obligation. Finally, we are convinced that if a controlling board nevertheless finds the teacher's refusal of recall improper or unreasonable under our holding here, the controlling board may treat the teacher's refusal to accept recall as an abandonment.[153]

The Commission's decision in *Tomiak* was affirmed by the Michigan Court of Appeals, which ruled:

> [W]hen a tenured teacher's services are terminated due to a necessary reduction in personnel, no controlling board can realistically expect the teacher to remain idle in the hope that a vacancy will occur. Defendant's view, if adopted, might cause other school systems to refrain from hiring qualified teachers who are laid-off, for fear that the teachers would have to accept the first recall by their prior employer or forfeit tenure previously achieved. . . .
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> . . . .
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> We hold that a teacher's refusal to accept the first recall opportunity does not automatically extinguish his or her recall rights.[154]

In *Tomiak* the Court determined that restoration of tenure and provision for a hearing before the board was appropriate. Once the teacher has refused recall because of a conflicting commitment to another district, however, the recalling board does not have to consider the teacher for recall until the term of the other contract has ended.

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[153] Tomiak v. Hamtramck Sch. Dist., TTC 80-54 at 6-7.

[154] Tomiak v. Hamtramck Sch. Dist., 138 Mich. App. 644, 651, 360 N.W.2d 257, 260 (1984).

Tomiak does not create the only situation in which recall rights survive refusal of recall.[155] Teachers have the right to refuse recall if the position offered is not comparable to the one previously held.This rule permits teachers laid-off from full-time positions to refuse less than full-time assignments and would allow part-time teachers to refuse full-time positions without losing their rights to future recall. Several decisions illustrate this principle.

In *Federspiel v. Meridian Public Schools*,[156] a laid-off tenured teacher was recalled to a 60% position teaching junior high school mathematics.The teacher contacted the superintendent and advised him that she could not accept the position for financial reasons; he told her that her refusal would constitute a resignation from the district. Even though the Commission ruled that the part-time mathematics position was a vacancy within the meaning of Article IV, Section 5 of the Tenure Act, it sustained the teacher.The Commission stated:

> The purpose of the Tenure Act is to protect teachers' rights and to limit the power of local boards in their employment of teachers. We believe that to require full-time teachers to accept recall to part-time positions or lose their right to future recall would not further this purpose.[157]
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> . . . .
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> . . . .[W]hile tenured teachers whose services have been terminated by a necessary reduction in personnel must be offered the first position, whether full-time or less than full-time, for which they are certified and qualified, they do not lose their rights to future recall if they refuse to accept positions which are not comparable to the position held prior to their termination.[158]

A teacher who refuses recall because the position offered is not comparable to the one from which he was laid off must inform the controlling board of his reason.[159] Thereafter, the district must only consider the teacher for recall to comparable positions. This type of refusal waives any claim for recovery for failure to recall during the period in which there is no comparable position vacant. The Commission in *Federspiel* stated that three factors were to be considered in determining comparable positions: 1) the number of hours employed, 2) the amount of fringe benefits, and 3) the level of salary.[160]

A full-time teacher whose services are terminated by a necessary reduction in personnel and who accepts recall to a part-time position does not lose his right to be recalled to a full-time position.In *Hendges v. Oak Ridge Public Schools*,[161] a full-time tenured teacher who had been recalled to a half-time position later claimed that she was entitled to a full-time teaching vacancy that became available.In ruling for the teacher, the Commission stated:

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[155] "We did not determine that this [conflicting obligation with another district] was the only situation in which recall rights survive refusal to return to the 'first vacancy.'" Federspiel v. Meridian Public Schs., TTC 81-71 at 8.

[156] TTC 81-71.

[157] Id. at 9.

[158] Id. at 10; *accord*, Lee v. Garden Sch. Dist., TTC 82-87 and 82-88.

[159] Id. at 10.

[160] Id. at 11. Because the Commission held that a teacher returning from leave of absence was not entitled to the identical assignment he last held (Weidman v. Brandon Sch. Dist., TTC 81-53), a teacher returning from layoff has no tenure rights to an "identical" position.

[161] TTC 80-29.

> A tenured teacher, by virtue of his/her past employment, is afforded by the Act a right to be placed in any position for which he/she holds the appropriate certification and meets the qualifications where promulgated. A tenured teacher meeting these requirements must be offered the position over a competing probationary teacher.[162]

A teacher who voluntarily requests an assignment to a part-time position does not waive his right to full-time assignment in the same district. In *Barretta v. Plymouth-Canton Schools*,[163] the teacher requested and was granted a part-time teaching assignment for the 1977-78 school year. She taught an 80% teaching position for the next four years. In 1981-82, she requested a full-time position. The Board informed her that she had relinquished her right to full-time employment when she took the part-time position, and she was again assigned a part-time position for 1981-82. The Tenure Commission held that "a full-time tenured teacher, who requests and is granted a part-time position, does not relinquish his right to full-time employment in that district merely by virtue of requesting and accepting part-time employment."[164]

In *Valesano v. White Pine School District*,[165] the Commission, in holding that a controlling board was not obligated to reschedule classes and alter teaching assignments to accommodate the return of a laid-off tenured teacher, recognized implicitly that a teacher has a right to be recalled to a part-time position if the board has established such a position.

Recall From Private Employment

Laid off tenured teachers who accept employment in the private sector are not protected by the Commission's holding in *Tomiak*, which was based on the conflicting statutory obligations a midyear recall would create. Laid-off teachers employed in the private sector have no competing statutory obligations encompassing individual teacher contracts and Tenure Act obligations. Unlike the situation in *Tomiak*, a teacher in private employment cannot acquire Tenure Act status which could be revoked if he leaves that employment to accept recall; nor could teacher contract rights be violated. Therefore, refusal to accept recall from private employment constitutes abandonment.[166]

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[162] Id. at 5-6.

[163] TTC 81-62.

[164] Id. at 8.

[165] TTC 78-47.

[166] Private Decision, TTC 83-19. Here the teacher was employed in a private school and had entered into a contract terminable at will by either party. Therefore, he would have suffered no adverse legal consequences had he accepted recall.

Procedural Protection for Teachers Refusing Recall

A teacher who refuses recall must be offered an opportunity to be heard before the controlling board may revoke tenure status.In *Tomiak v. Hamtramck School District*,[167] the Court stated that even if a teacher has abandoned his employment, removal of the teacher's name from the recall list (which the Court viewed as a revocation of tenure) must be preceded by a hearing. In *Johnson v. Sparta Area Schools*,[168] several teachers refused recall. The board took formal action to forfeit their tenure rights. No prior notice, charges, or hearing were provided; nor did the board specifically advise the teachers of the possible consequences if they failed to accept recall. The Commission held that this was an error under any possible interpretation of the Court's *Tomiak* decision.[169]

The remedy for failure to follow proper procedures in revoking tenure is not reinstatement and backpay. In *Tomiak*, the Court of Appeals found that such an award would be excessive. The Court required only reinstatement of tenure and hearing before the board.Relying on *Tomiak*, the Commission held in *Johnson* that if teachers either declined recall or failed to respond to the offer and the controlling board revoked tenure without a hearing, restoration of tenure status and provision of a board hearing was the appropriate remedy.[170] After affording the teachers the opportunity to be heard, the board should determine again whether to treat the teachers' actions as abandonment and whether to invoke the tenure forfeiture penalty.

Subterfuge

Subterfuge refers to any improper method of denying recall or removing teachers. To understand the meaning of subterfuge as it is related to the Tenure Act, it is necessary to review the authority of local school boards.

The management and control of the educational programs and financial policies of the various school districts is vested in the controlling boards, which determine curriculum, staffing requirements, and qualification standards for teachers. However, the authority possessed by a local board of education to lay off its tenured teachers and decrease its teaching staff comes with the obligation to make decisions in accordance with the provisions of the Tenure Act. If the board's determinations are not arbitrary, capricious, or made in bad faith, the Tenure Commission is bound to apply them;[171] but a school district's failure to follow its own procedures and standards in making layoff and recall decisions may support a viable claim of improper action under the Teachers' Tenure Act.[172]

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[167] 138 Mich. App. 644, 360 N.W.2d 257 (1984).

[168] TTC 84-10.

[169] By equating removal from the recall list with tenure revocation, the *Tomiak* opinion makes it unclear whether action recognizing voluntary relinquishment of employment, or action invoking the forfeiture penalty, or both, requires provision of an Article IV hearing.

[170] Johnson v. Sparta Area Schs., TTC 84-10.

[171] Freiberg v. Bd. of Educ. Big Bay de Noc, 61 Mich. App. 404, 232 N.W.2d 778 (1975).

In order for a teacher to appeal a layoff decision, he must allege bad faith. The Court of Appeals stated:

> Since the act is silent with regard to what constitutes a "necessary reduction in personnel" such issue is not appealable unless cast in terms which allege that the "necessary reduction in personnel" was not made in good faith but amounted to a subterfuge to avoid the act's protections.[173]

Definition of Subterfuge

Subterfuge may be defined as a controlling board of education's attempt to circumvent the protections that the Act guarantees to tenured teachers. In each case, the issue is "whether the defendant board of education under the guise of a necessary reduction in personnel, used circuitous methods in removing the plaintiff from its school system without the protections afforded by the teacher's tenure Act."[174]

Charges against school boards of "circuitous methods" have included the following:

Retention of probationary teachers in positions for which laid-off tenured teachers are certified and qualified to fill.[175]

The absence of economic necessity coupled with exaggeration of financial difficulties, concealment of funds, use of improper accounting methods, a desire to maintain the district's fund equity, failure of the board to disclose relevant economic circumstances, or poor management.[176]

Manipulation by the board of class schedules by juggling or fragmenting teaching assignments for the purpose of excluding certain tenured teachers.[177]

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[172] Bernardo v. Woodhaven Bd. of Educ., TTC 80 34; Marenettee v. Roseville Sch. Dist., TTC 80-6.

[173] Chester v. Harper Woods Sch. Dist., 87 Mich. App. 235, 244, 273 N.W.2d 916 (1978).

[174] Freiberg v. Big Bay de Noc Sch. Dist., 61 Mich. App. 404, 415, 232 N.W.2d 718, 723 (1975).

[175] Rogers v. Clio Area Schs., TTC 81-78; Baszler v. Pellston Public Schs., TTC 81-77; Brzak v. Huron Valley Schs., TTC 81-12; Krantz v. Imlay City Community Schs., TTC 81-5; Farmer v. Holton Public Schs., TTC 78-52; Brumbaugh v. Sch. Dist. Lincoln Park, TTC 73-73-R; Billideau v. Boyne Falls Public Schs., TTC 75-39.

[176] Freiberg v. Bd. of Educ. Big Bay de Noc, 61 Mich. App 404, 232 N.W.2d 778 (1975); Aoun v. Sch. Dist. City of River Rouge, TTC 81-33; Roth et al. v. Ecorse Public Schs., TTC 81-63; Kelly v. Gobles Bd. of Educ., TTC 81-31 and 81-54; Gray et al. v. Sch. Dist. City of River Rouge, TTC 80-10 and 80-19; Krantz et al. v. Imlay City Community Schs., TTC 81-5; Schnooberger v. Hartford Public Schs., TTC 77-38; Page v. Harper Woods Public Schs., TTC 73-60-R; Freiberg v. Big Bay de Noc Sch. Dist., TTC 71-36.

[177] Chester v. Harper Woods Sch. Dist., 87 Mich. App. 235, 273 N.W.2d 916 (1978); Hoard v. Crestwood Sch. Dist., TTC 82-25; Thorsen v. Carrollton Public Schs., TTC 81-76; Krantz v. Imlay City Community Schs., TTC 1-5; Maciak v. Center Line Public Schs., TTC 78-18; Freiberg v. Big Bay de Noc Sch. Dist., TTC 71-36; Chester v. Harper Woods Sch. Dist., 73-64-R.

Failure of the board to manipulate, juggle, or fragment teaching schedules in order to retain or recall certain tenured teachers.[178]

Classifying positions as substitute or designated teachers, or as teacher aides in order to lay off or prevent the recall of tenured teachers.[179]

Failure of the board to follow its own qualification standards.[180]

Failure of the board to follow its own transfer policy.[181]

Refusal of the controlling board to levy all mills authorized for operations.[182]

Making grossly incorrect enrollment projections that resulted in unnecessary layoff of elementary teachers.[183]

Retention of uncertified teachers in positions for which laid-off tenured teachers were qualified to fill.[184]

Termination of an incumbent tenured teacher's services when a position for which he was certified and qualified was available, in order to hire someone who was more qualified.[185]

Misleading a teacher about the likelihood of recall, thereby inducing him to waive his right to recall.[186]

Timing of the notice of layoff.[187]

Failure of the board to comply with the provisions of the collective bargaining agreement.[188]

Failure of the board to give sufficient advance notice to on-staff teachers who did not have the certification needed to assume a position that would have prevented layoff.[189]

Failure of the board to seek special certification for tenured teachers in order to facilitate his recall.[190]

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[178] Hadacz v. Northwest Bd. of Educ., TTC 83-36 and 83-37; Simpson v. Roseville Community Schs., TTC 82-72; Wogerman v. Branch Intermediate Sch. Dist., TTC 81-42; Krantz v. Imlay City Community Schs., TTC 81-5; Valesano v. White Pine Sch. Dist. TTC 78-47; Goodrich v. Pontiac Bd. of Educ., TTC 78-46; Maciak v. Center Line Public Schs., TTC 78-18; Billideau v. Boyne Falls Public Schs., TTC 75-39; Chester v. City of Harper Woods Schs., TTC 73-64-R.

[179] Kadacz v. Northwest Bd. of Educ., TTC 83-36 and 83-37; Pfeifer v. Westwood Heights Sch. Dist., TTC 82-78; Baszler v. Pellston Public. Schs., TTC 81-77; Masters v. Hamtramck Bd. of Educ., TTC 77-20.

[180] Rogers v. Clio Area Schs., TTC 81-78; Krantz v. Imlay City Community Schs., TTC 81-5.

[181] Brisbois v. Garden City Schs., TTC 82-23.

[182] Pencak v. East Detroit Sch. Dist., TTC 82-67.

[183] Albrecht v. Harper Creek Community Schs., TTC 83-66 and 83-67.

[184] Kadacz v. Northwest Bd. of Educ., TTC 83-36 and 83-37.

[185] Page v. Harper Woods Public Schs., TTC 73-60-R.

[186] Tomiak v. Hamtramck Sch. Dist., TTC 80-54.

[187] Apap v. Walled Lake Consolidated Sch. Dist., TTC 83-84; Schnooberger v. Hartford Public Schs., TTC 77-38.

[188] Thorsen v. Carrollton Public Schs., TTC 81-76.

[189] Christner v. Calhoun County Intermediate Sch. Dist., TTC 82-83.

[190] Valesano v. White Pine Sch. Dist., TTC 78-47; Goodrich v. Sch. Dist. of Pontiac, TTC 78-46.

Jurisdiction of Tenure Commission

The authority of the Commission is limited when reviewing a controlling board's decisions regarding necessary reductions in personnel. It may not alter a school district's budget, staffing, or qualification determinations except on a showing of bad faith or arbitrary action.[191] The Tenure Commission has the authority to decide whether the local school board laid-off teachers because of a genuine need to reduce its staff. In *Freiberg v. Big Bay de Noc Board of Education*, the Court posed this question:

> [D]oes the teacher tenure commission have jurisdiction to review the action of a school board which has terminated a tenured teacher's employment on the grounds of 'necessary reduction in personnel', in order to determine whether, as a factual matter, the reduction in personnel was made in good faith or as a subterfuge to deprive a teacher of his or her rights under the tenure act?[192]

In *Freiberg*, a tenured teacher had been laid off for the 1971-72 school year due to an alleged "necessary reduction in personnel" caused by declining enrollments and economic necessity. Freiberg complained that his layoff was not caused by any financial problem or enrollment change, but that rather the board "juggled" class assignments in order to terminate him. A further complication in *Freiberg* was the fact that a new probationary teacher was hired to fill a vacancy in the district. Freiberg argued that a simple reassignment of a veteran teacher would have made room for him in an area of his certification.Freiberg believed that the superintendent and school board members were antagonistic toward him because of his leadership in the teacher's union.

When Freiberg appealed, the Tenure Commission held that "[a]n investigation by this Commission into the necessity or reasons for layoffs would soon abrogate the rights of the school board and nullify the purpose of this section (Article IV, Section 5) of the statute."[193]

On appeal, the Court held that the Commission did have jurisdiction to hear the complaint and directed the Commission to determine whether the local school board's action was a bona fide administrative economic necessity or a mere subterfuge. The Court stated:

> Where a teacher alleges that the termination of his or her employment was not done in good faith as a "necessary reduction in personnel" and that the stated justification was actually a subterfuge, the tenure commission has jurisdiction to determine, as a factual matter, whether the local school board took the action because of bona fide economic necessity.[194]

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[191] Chester v. Harper Woods Sch. Dist., 87 Mich. App. 235, 273 N.W.2d 916 (1978).

[192] 61 Mich. App. 404, 409, 232 N.W.2d 718, 720 (1975).

[193] Freiberg v. Big Bay de Noc Bd. of Educ., TTC 71-36 at 2.

[194] Freiberg v. Big Bay de Noc Bd. of Educ., 61 Mich. App. 404, 414, 232 N.W.2d 718, 722 (1975) citing 37 Mich. L. Rev. 430, 431 (1939).

The court based its holding on the ground that the purpose of the Michigan Teachers' Tenure Act was to prevent deleterious practices of school boards—namely, the discharge of teachers "in order to effect economies either by diminishing the amount of work assigned to those retained, or by creating vacancies to be filled by lower salaried, inexperienced employees."[195] On remand, the Commission's majority determined that the decision was based on administrative necessity and upheld the layoff.[196] The Commission later announced, in another case, the following policy for layoff and recall situations:

> These Commissioners are aware of the opportunity school boards have, if they are so inclined, to circumvent the provisions of the Tenure Act by juggling assignments and *manipulating* course offerings in a manner which would cause a lay-off or block the recall of a tenured teacher. The result of such action is the effective dismissal of a tenured teacher without observing the due process provisions of the Act.Upon appeal, we will scrutinize any complaint to determine if a board's actions were made in good faith, and will discourage the employment of any new teacher when tenured teachers are on layoff.[197]

In determining the validity of school board policies, the Commission may not supersede the local board's statutory authority and must afford the controlling board's determination "the deference it [is] due."[198] The Commission may not challenge the appropriateness of the action taken, dictate preferred programs, or substitute its ideas on school management and finance for those of a local board. School board decisions made in good faith may not be reversed; in reversing them, the Commission would substitute its management ideas for those of the controlling board. The Commission is not empowered to resolve claims that are merely contractual in nature.[199] Thus, where a laid-off teacher alleged that the collective bargaining agreement obligated the district to retain her, the Commission held that her claim of guaranteed employment could not be enforced by the Commission.[200]

The Commission has jurisdiction to determine 1) whether the record establishes factually that there was a "necessary reduction in personnel" as set out in the Tenure Act, and 2) whether the record establishes subterfuge.[201]

Test for Subterfuge

In order to determine whether a layoff is bona fide and not a subterfuge, the Commission utilizes the following test:

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[195] Id. at 413, 232 N.W.2d at 722, citing 37 Mich. L. Rev. 430, 431 (1937).

[196] Freiberg v. Big Bay de Noc Bd. of Educ., TTC 71-36-2.

[197] Chester v. Harper Woods Public Schs., TTC 73-64 at 6, *rev'd on other grounds*, Chester v. Harper Woods Sch. Dist., 87 Mich. App. 235, 273 N.W.2d 916 (1978).

[198] Chester v. Harper Woods Sch. Dist., 87 Mich. App. 235, 247, 273 N.W.2d 916, 921 (1978).

[199] Bernardo v. Woodhaven Bd. of Educ., TTC 80-34.

[200] Roberts v. Clintondale Community Schs., TTC 85-19.

[201] Schnooberger v. Hartford Public Schs., TTC 77-38.

> [I]f another person is employed to perform substantially the identical service, either under the same or a different title, the purported abolition is a subterfuge; if another is not so employed, the position has been legally abolished, and it is not a subterfuge.[202]

Board Authority

If there is no evidence of bad faith, a controlling board of education has the authority to decide its educational programs and the qualifications of teachers for those programs. Several Commission decisions illustrate this. In ***Brumbaugh v. Lincoln Park School District***,[203] the board had reinstated elementary physical education and elementary vocal music and employed probationary teachers for the positions. The board had required that applicants for these positions have a major in the special subject plus an elementary teaching certificate. Laid-off tenure teachers with elementary teaching certificates appealed to the Commission, claiming that they should have been appointed to the "special" physical education and music positions by virtue of their certification, which authorized them to teach all subjects in the elementary grades. The Tenure Commission upheld the board, stating:

> The record is void of any evidence that the decision of Appellee in the fall of 1972 to reinstate the programs in elementary physical education and elementary vocal music with the requirement that teachers in these areas have majors in either of these subjects, as well as elementary teaching certificates, was a subterfuge to cover arbitrary and capricious action against Appellants. In this instance, it appears that Appellee acted well within its responsibility to establish curriculum and exercise its discretion to determine the qualifications of its teachers.[204]

In *Pfeifer v. Westwood Heights School District*,[205] the controlling board had received certain funds from the state under sections 31-35 (commonly known as Article 3) of the State School Aid Act. These sections authorize the allocation of funds to school districts for compensatory education programs to improve the basic cognitive skills of pupils enrolled in kindergarten and grades one through nine. The Department of Education set out the criteria for use of these funds in its administrative rules. The controlling board decided, with the Department of Education's approval, to use the funds to employ nine teacher aides.

Pfeifer challenged the board's action of employing teacher aides for the compensentory program rather than recalling laid-off teachers. She alleged that hiring the aides was a subterfuge to prevent her recall, and that even if the district believed it was wise to hire aides in place of tenured teachers, such action was not permitted under the Tenure Act. The Commission found that the board's decision to hire the teacher aides was made in good faith and was not a subterfuge. The board was under no obligation under the Tenure Act to use the compensatory education funds to create a vacancy in order to facilitate Pfeifer's recall. *Pfeifer* illustrates the rule that the Commission cannot substitute its judgment for that of the local board as to how funds should be spent.

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[202] Annot., 87 A.L.R.3d 1165 (1181).

[203] TTC 73-73-R.

[204] Id. at 6.

[205] TTC 82-78.

Teachers' Rights

A controlling board will often assert that it eliminated teaching positions and laid off personnel because there was no need for the teachers' services or because of economic difficulties. The board will deny that it was motivated by any desire to circumvent the teachers' rights under the Teachers' Tenure Act. Teachers sometimes claim that the board is using economic necessity or other reasons as a subterfuge to conceal its real motives. The following is an example of such a charge by teachers:

> Specifically, appellant asserted that: 1) there was no *bona fide* need to terminate his services; 2) appellee manipulated teaching assignments, course offerings, and placed unqualified teachers in certain assignments to preclude appellant's retention, and 3) these actions were motivated by the administration's personal animus toward appellant.[206]

Teachers may press any feasible claim that the board erred in determining that their services should be terminated. Claims are not limited to economic necessity or manipulation of schedule; nor does the existence of a bona fide necessary reduction in personnel or the absence of manipulation of class schedules prevent a claim. A teacher may assert, for example, that the board's determination of which teachers to retain or recall contravened other provisions of the Tenure Act. In *Brazak v. Huron Valley Schools*,[207] tenured teachers alleged that the board had employed probationary teachers in positions for which the tenured teachers were certified and qualified. The Commission found that at the time of their termination, the board had mistakenly believed the tenured teachers to be probationary. This error had the effect of denying the teachers' rights to continued employment.

Burden of Proof

This general rule places the burden of proof on the party making a claim:

> [I]n Court proceedings, the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal. This is usually the claimant, complainant, or applicant, but the party resisting a claim may have the burden of proving a bar to such claim. . . .[208]

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[206] Hoard v. Crestwood Sch. Dist., TTC 82-25.

[207] TTC 81-12.

[208] Am. Jur. 2d, *Administrative Law*, Section 391 (197-98).

However, the burden of establishing the need to reduce personnel falls upon the controlling board, because the board has the information required to make decisions about necessary reductions in personnel. In *Goodwin v. School District of Kalamazoo*,[209] the Tenure Commission defined burden of proof:

> In its strict sense, the term denotes the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises. . . .[210]

Economic Necessity Tests

In *Aoun v. School District of River Rouge*,[211] several teachers alleged that their termination had not been due to a necessary reduction in personnel. Rather, they claimed, they were caused by 1) mismanagement of the district's revenues, 2) exaggeration of the district's financial difficulties, and 3) the board's failure to arrange the school district's financial situation in a way that would not make the teachers carry a disproportionate burden for the board's mismanagement. The Commission determined that none of the charges established subterfuge.

A tenured teacher's services may be terminated pursuant to a bona fide necessary reduction in personnel even if funds are available to support the teacher's position.In *Schnooberger v. Hartford Public Schools*,[212] the Commission sustained the school board's decision to terminate the teacher's services although it was based, in part, on the board's desire to maintain the district's fund equity. The Commission deferred to the school board's statutory authority to manage and control the district's finances and educational program.

In *Krantz v. Imlay City Community Schools*,[213] several teachers challenged the termination of their services on the ground that the school district's fund equity could have been used to pay their salaries. The Commission wrote in pertinent part:

> To be sure, the $334,000 remaining at the end of the year would have covered appellants' salaries for the period from February through June even with the added expenditure associated with the roof repairs. But, if appellee had elected to follow this course, the district's remaining fund balance would have been reduced substantially. We have held in the past that a tenured teacher's services may be terminated pursuant to a bona fide necessary reduction in personnel even though there are funds available to support the teacher's position. In *Schnooberger, supra*, we sustained the school board's decision to terminate the teacher's services which was based, in part, on a desire to maintain the district's fund equity. We recognized and deferred to the school board's

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[209] TTC 74-5-R at 2.
[210] Id. at 3, citing 29 Am. Jur. 2d, *Evidence* Section 123 (154).
[211] TTC 81-33.
[212] TTC 77-38.
[213] TTC 81-5.
[214] Id. at 5-6 (footnotes omitted).

> statutory authority to manage and control the district's finances and educational program in reaching our conclusion in *Schnooberger*. Moreover, we find this rationale controlling here. We do not believe the Tenure Act mandates substantial depletion of a school district's fund balance before a bona fide necessary reduction in personnel can be declared.[214]

The Commission reached a similar conclusion in *Roth v. Ecorse Public Schools*.[215]

In *Bernardo v. Woodhaven Board of Education*,[216] teachers alleged that the board had concealed funds by engaging in improper accounting practices. The Commission found that the challenges were little more than disagreements about how several changes in state funding should be reflected in the board's accounting system and that the end result was the same. The teachers also questioned the board's methods of trimming its budget for the 1980-81 school year. The board had implemented a long list of austerity measures to reduce the district's expenditures. The teachers argued that these reductions were insufficient to accomplish a district-wide austerity program because the dollar amounts that had been budgeted for many of the curtailed services for the 1980-81 school year were greater than the amounts spent in the 1979-80 school year. Because the Commission found that these differences were due to ongoing contractual commitments and the effect of inflation, the teachers' argument was rejected.

In *Dencak v. East Detroit School District*,[217] several teachers alleged that there had been no financial emergency that could justify their layoff. They claimed that the board had refused to levy all of its authorized mills and that such a levy would have produced enough revenue to retain them.

The board said that its decision not to levy the authorized mills was based on its promise to the electorate. The board had requested approval for 5.85 mills but had promised to levy only 2.15 mills. The board asserted that the higher figure of 5.85 mills was used in order to take advantage of a unique subsidy provision in the 1978 state aid act, which in effect resulted in the state paying school districts the dollar equivalent of authorized but unlevied millage.

The Commission held that the decision of the board not to levy the additional authorized millage was based on a promise to the electorate and did not constitute a subterfuge.

Rearrangement of Class Schedules

Class scheduling decisions are solely within the province of local boards. If a class scheduling decision is not found to have been arbitrary, unreasonable or made in bad faith, the board's decision may not be overturned.[218] Teachers often scrutinize class schedules and teaching assignments in order to determine whether the board's decision was an attempt to cause their layoff or prevent their recall—and whether it was made in bad faith.

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[215] TTC 81-63.
[216] TTC 80-34.
[217] TTC 82-67.
[218] Goodrich v. Sch. Dist. of Pontiac, TTC 78-46.

In *Page v. Harper Woods Public Schools*,[219] a district faced a serious economic problem for the 1972-73 school year. The board reduced its industrial arts program and establishes a less expensive vocational education program. Teachers in the vocational education program were required to be certified for vocational education. Page did not have such certification and was reassigned to teach three social studies classes (his minor area of certification and study) as well as two industrial arts classes. For the following school year, 1973-74, the industrial arts staff was reduced to one instructor. An instructor senior to Page was retained, and Page was laid off effective June 28, 1973.

When Page was laid off, the board knew it would need a social studies teacher for 1973-74; that position was filled by a teacher other than Page. The Commission found that the board's conduct was a subterfuge designed to remove Page as a teacher in the district. The Commission decided that no economic justification existed for terminating Page and that he had met the board's standards for competency by his performance as a social studies instructor in his previous year's teaching. The Commission stated:

> The district knew that a social studies position would be available for the 1973-74 school year. The district knew that Appellant had the necessary certification for that position as well as the qualifications for it. Yet rather than place Appellant into the social studies position, one for which he was certified and had established his qualifications for by his performance in the prior school year, the board terminated Appellant. After his termination the district then reviewed the qualifications of all those eligible including Appellant and determined another teacher was more qualified.We hold the Board action here, terminating Appellant when a position for which he was certified and qualified was available and by placing him on "lay-off status" and then determining his rights to the position, a subterfuge. We find this procedure to be one of the circuitous methods warned of by the Court of Appeals in *Freiberg, supra*, used by a Board to terminate a tenured teacher without affording him the protections required by the Teachers' Tenure Act. Such actions by a board of education frustrate the spirit of the act and are a violation of its statutory purpose.[220]

In *Stevens v. School District of Harper Woods*,[221] a laid-off teacher (Stevens) alleged that the controlling board had shifted schedules to fill a position for which he was certified and qualified in order to prevent his recall. It was alleged that in the middle of the school year, the board had reassigned two on-staff teachers to fill a vacancy and had shuffled the assignments of five other teachers. The board defended its decision by 1) presenting evidence that it had honored the transfer request of an on-staff teacher, and 2) arguing that it had decided to reduce its teaching staff because of declining enrollment and other economic factors. In addition, the board claimed it had been concerned about certain proposals that would have reduced state revenues if successful. The Commission found the board's reasons for filling the vacancy by means of on-staff reassignments to be valid and concluded that there was no indication that the school district had engineered the reassignment for the purpose of denying Stevens' recall.

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[219] TTC 73-60-R.

[220] Id. at 7-8.

[221] TTC 81-19.

Stevens also argued that subterfuge had been committed because the board had made the reassignments in midyear. The Commission found that the vacancy in midyear was caused by the unexpected resignation of a teacher and that reassignments had to be made at that time.

Stevens also argued that the board had failed to post the position as it had done for previous vacancies. The Commission found that these prior vacancies had been posted because they could not be filled by reassignments. The Commission was unpersuaded that the posting of these particular positions and the board's failure to post another position demonstrated a lack of good faith on the part of the school district. The Commission also noted that currently employed tenured teachers are entitled to consideration for positions prior to teachers whose services have been terminated due to a necessary reduction in personnel.[222]

Brisbois v. Garden City Schools[223] provides an interesting example of manipulation. The controlling board and the teachers' association had negotiated an Early Retirement Incentive (ERI) in December, 1981. The ERI allowed qualified on-staff teachers to retire and receive roughly one-half of their former salaries. Teachers on layoff were to be recalled as replacements and were to be paid from the remaining portion of the retiring teachers' salaries, thus insuring that the ERI program would not increase the district's total salary costs. The board's approval of a teacher's application for ERI benefits was contingent upon the availability of a certified replacement. Finally, laid-off teachers were to be afforded the first opportunity to replace the ERI teachers, but they were not required to accept these positions.

The board received the first ERI application shortly after the collective bargaining agreement was ratified in December. Twenty-two more applications were received before the May 28 deadline. The board took no action to grant any of the ERI applications until after the May 28 deadline had passed.

When the board announced its tentative staffing plan, it treated twelve ERI applicants as though they would be on staff in the fall. Seven of these twelve ERI applicants were assigned to positions for which the laid-off complaining teachers were certified and qualified to hold. Some of the ERI applicants were transferred to positions they had not held in the past and, in three instances, the transfers were to positions last held by some of the complainants.

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[222] Page v. Harper Woods Public Schs., TTC 73-60-R; Chester v. Harper Woods Public Schs., TTC 73-64-R.

[223] TTC 82-33.

The board explained that these changes were necessary to carry out the ERI program in a proper and orderly fashion; that is, the ERI applicants were assigned the positions of the least senior teachers in order to minimize rescheduling. The board also argued that its method would assist in identifying the reduced salary replacements. The board contended further that it had to treat the ERI applicants as on-staff because their ERI applications could have been rescinded at any time prior to formal acceptance by the school board. In addition, the board argued that if the ERIs had rescinded their applications, the appellants' services would have been terminated.

There were no rescissions, however. Furthermore, 11 more ERI applications were submitted after the tentative staffing plan was published. The board granted these in early June of 1982. The Commission found that the board had known, prior to the end of the 1981-82 school year, that there were vacant positions available for each of the applicants.The Commission ruled that the board had improperly terminated the appellants and did not comport with the Tenure Act.

The decision in *Brisbois* was based on *Page v. Harper Woods Public Schools*[224] where the Commission held that terminating a tenured teacher's services when there is a known vacancy that the teacher is certified and qualified to hold is a subterfuge. The Commission ruled that the board in this case could not be excused on the ground that its actions were required in order to carry out the provisions of the collective bargaining agreement.[225] The terminated teachers in *Brisbois* were reinstated and awarded all salary lost.

In *Wheeler v. L'Anse Creuse School District*,[226] the complaining teacher asserted that the controlling board had prevented his recall by employing a new band director. He claimed that the hiring of the new band director was improper because the board had tailored the job's qualification standards specifically for the individual it wanted to hire. This resulted in two other teachers being transferred, one of them into a position for which the appellant was certified and qualified. In ruling against Wheeler (the appellant) the Commission stated:

> We believe that, in order to state a claim of failure to recall because of the transfer of an on-staff teacher, a laid-off teacher must allege that the bad faith complained of was directed at the complaining teacher, *i.e.* that the allegedly improper action was designed to prevent the teacher's recall. It is not sufficient for purposes of stating a claim of failure to recall under the Act to allege that the effect of an allegedly improper action was to prevent the teacher's recall. This is particularly so where, as in the present situation, the effect complained of is so far removed from the action alleged to be improper.[227]

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[224] TTC 73-60-R.
[225] Six v. Muskegon Public Schs., TTC 81-17.
[226] TTC 82-74.
[227] Id. at 5.

In *Hoard v. Crestwood School District*,[228] a laid-off music teacher asserted that his board discontinued vocal music and juggled teaching assignments in order to eliminate his services. The Commission found that the board's decisions were not made in good faith. The school principal testified that he had recommended elimination of the vocal music position because of scheduling difficulties. However, the superintendent testified that declining enrollments and lack of student interest had required elimination of vocal music. The principal denied that lack of student interest had any bearing on the decision. The Commission found that the contradictory reasons given by the principal and superintendent undermined the board's reasons for elimination of the program. Secondly, the Commission determined that the board's justification for the layoff because of scheduling problems was given little credence because they had been managed in prior years. The Commission determined that the board's motivation was to abolish the vocal music program was personal to the teacher. The Commission stated:

> We find that appellant's past encounters in connection with his union representative activities with both the principal and the superintendent were heated and bitter. For example, in one instance the principal indicated he wanted to "knock appellant's block off" because of a grievance appellant had filed. Similarly, the superintendent became so angry at and argumentative with appellant at one school board meeting that one board member felt it necessary to admonish the superintendent.
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> In another incident, when the superintendent and appellant met to discuss a grievance, the superintendent shouted at appellant saying that appellant's distrust indicated the appellant had something to hide in his own background inferring that appellant's credentials would be investigated.We also find that appellee's administrators knew appellant desired placement in the vocal music position when they were deciding whether or not it should be continued. Moreover, we find that the building principal stated to a group of teachers that if appellant was to be assigned to teach vocal music the principal did not want to offer the class at all. This statement was made before the principal consulted with the faculty regarding possible abolishment of the vocal music program. . . . Thus, we find that the dominant motive for eliminating vocal music was personal animus not the stated desire to provide an equal, though diminished, program to all students, In short, we conclude that appellee engaged in subterfuge to block appellant's continued service as a full time employee.[229]

It is well established that, under the Teacher's Tenure Act, a controlling board need not manipulate class schedules or fragment teaching assignments in order to accommodate the recall of a tenured teacher. If the obligation exists at all, it is created by the controlling board's adoption of such a procedure.[230]

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[228] TTC 82-25.

[229] Id. at 6-7.

[230] Hadacz v. Northwest Bd. of Educ., TTC 83-36; Wogerman v. Branch Intermediate Sch. Dist., TTC 81-42; Krantz v. Imlay City Community Schs., TTC 81-5; Goodrich v. Pontiac Bd. of Educ., TTC 78-46; Valesano v. White Pine Sch. Dist., TTC 78-47; Maciak v. Center Line Public Schs., TTC 78-18; Billideau v. Boyne Falls Public Schs., TTC 75-39.

In *Wogerman v. Branch Intermediate School District*,[231] the Commission stated that it had frequently held that the Tenure Act does not impose any affirmative obligation on controlling boards to rearrange teaching assignments in order to facilitate the recall of a tenured teachers. In the absence of proof of bad faith or arbitrary action, a school board's staffing decisions may not be disturbed.[232]

In *Billideau v. Boyne Falls Public Schools*,[233] the Commission determined that a school board is not required to "fragment" an on-staff teacher's assignment and give portions of that schedule to a teacher who has been laid off under a necessary reduction in staff.

In *Maciak v. Center Line Public Schools*,[234] the question was whether the board should have manipulated teaching assignments to give Maciak (who was laid off) a position for which she was certified and qualified. The district's collective bargaining agreement included criteria for determining which teachers would be terminated due to a necessary reduction in personnel: seniority, certification, and qualification as determined solely by certification. In September, 1977, Fortin, a tenured teacher, was appointed dean of students at the junior high school. Wendy Robinson was assigned to the position Fortin had held as elementary physical education coordinator. This opened the position Robinson had held as physical education teacher for the 3rd through 8th grades at Engleman School. The assignment included three 8th grade physical education classes and three elementary physical education classes. The Engleman School position was assigned to Malachnik, a laid-off probationary teacher. Maciak argued that the position offered to Malachnik should have been assigned to John Robinson, an on-staff tenured teacher who was then assigned to a "substitute" position. Maciak had the necessary certification (qualifications) and seniority for the Robinson position. She claimed that the board engaged in a subterfuge by not giving her the substitute position occupied by Robinson. Because the Tenure Act does not require a school board to manipulate its schedule to accommodate the particular certification of a tenured teacher terminated due to necessary reduction in personnel, the Commission ruled against Maciak.

Krantz v. Imlay City Community Schools,[235] was also about manipulation of class schedules. A teacher named Berg had been assigned to a four-fifths assignment in the junior high school. The board had retained a less senior tenured teacher, Hanewicz, at the high school in an assignment that included three classes Berg was certified and qualified to teach. Berg requested that she be permitted to displace Hanewicz from one of those classes so that she could be restored to full-time employment. The board refused because of the difficulty associated with shifting teachers to and from buildings during the school day. In order to honor Berg's request the board would have had to manipulate manipulate and fragment the schedule. The Commission sustained the board's decision.

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[231] TTC 81-42.

[232] Id. at 5-6.

[233] TTC 75-39.

[234] TTC 78-18.

[235] TTC 81-5.

Although a school board's responsibilities are somewhat different with respect to layoff actions, the Tenure Act does not require the board rotate teaching assignments and realign teaching staff to avoid terminating the services of a tenured teacher.[236] It is important to remember, however, that a controlling board may not terminate the services of a tenured teacher when a known vacancy exists for which the teacher is certified and qualified. In this situation, the school district must transfer the tenured teacher who is in jeopardy of layoff to the vacant position.[237]

Reclassifying Positions and Reassigning Tenured Teachers

In *Hadacz v. Northwest Board of Education*,[238] the controlling board laid off several teachers because of a school millage defeat and reemployed them as "designated teachers"—a new classification created as a result of negotiations between the board and the teachers' collective bargaining agent. "Designated teachers" received a lower salary than regular teachers received. The teachers alleged that their employment as "designated teachers" at reduced compensation constituted an unlawful demotion under the Act.

In ruling for the controlling board, the Commission relied on its decision in *Masters v. Hamtramck Board of Education*.[239] There, the Commission had determined that no demotion occurs when a controlling board, acting in good faith, employs a laid-off tenured teacher as a substitute teacher at reduced wages. Under the *Masters* rule, a demotion occurs only if the teacher assumes full teaching responsibilities. The Commission found in *Hadacz* that the "designated teachers" did not assume the duties of regular teachers. They did not recommend students for promotion or retention, meet with parents, prepare written progress reports, maintain discipline or attendance records, participate in textbook selection, or engage in several other activities required of regular teachers. Moreover, their assignments were brief, usually to fill in for absent teachers.

It is an act of bad faith and a subterfuge for a controlling board to recall a laid-off tenured teacher and classify him as a substitute teacher when in fact the teacher has assumed full responsibility for the position. In *Masters v. Hamtramck Board of Education*,[240] the school district reemployed a laid-off teacher at the salary normally paid to substitute teachers. The Commission found that the position to which the teacher had been assigned was in fact a newly created one.

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[236] Wogerman v. Branch Intermediate Sch. Dist., TTC 81-42.
[237] Page v. Harper Woods Public Schs., TTC 73-60-R.
[238] TTC 83-36 and 83-37.
[239] TTC 77-20.
[240] TTC 77-20.

In addition, it found that the teacher had undertaken all the teaching duties normally associated with such a position. The Commission concluded that the school board had acted improperly by paying the teacher substitute teacher wages.

CHAPTER VI

Leave of Absence

Granting and Denying Leaves of Absence

Introduction

Leaves of absence are periods of time when one is temporarily away from regular professional duties and responsibilities. Ordinarily a granted leave permits absence from work without penalty.

Leave may be granted for professional purposes, such as exchange teaching or advanced academic work; for other reasons, such as illness, military or peace corps service, religious observances, jury duty, childbirth, child care, bereavement, or running for political office. Although most leaves of absence come at the request of the employee, a board may require an employee to take a temporary leave of absence when a sound reason exists, such as sickness or physical disability or candidacy for public office. A board of education may establish or agree by contract to any reasonable criteria in granting nonpaid leaves of absence.

Leave-of-absence status benefits a teacher by allowing him to retain job security, tenure rights, seniority, and such future benefits as retirement and disability insurance. Management is naturally concerned, however, with the negative, disruptive effects that can result from the absence of an experienced, perhaps irreplaceable teacher. Consequently, boards of education have an interest in promoting regular attendance and preventing abuse of leave-of-absence privileges.

The purpose of this chapter is to present a summary of the legal principles of leaves of absence for tenured teachers.These principles are derived from the statutes, an opinion of the Attorney General, and decisions of the courts and the Tenure Commission.

Statutory Authority for Leave of Absence

The Teachers' Tenure Act provides:

> Any controlling board upon written request of a teacher may grant leave of absence for a period not to exceed 1 year, subject to renewal at the will of the board: Provided,

> That without request, leave of absence because of physical or mental disability may be granted by any controlling board for a period not to exceed 1 year: Provided further, That any teacher so placed on leave of absence shall have the right to a hearing on such unrequested leave of absence in accordance with the provisions for a hearing in Article 4, section 4 of this act: Provided, That no leave of absence shall serve to terminate continuing tenure previously acquired under this act.[1]

A local board of education has authority under the Tenure Act to grant, upon written request of a teacher, a voluntary leave of absence not to exceed one year, subject to renewal at the discretion of the board. This provision does not require a school board to grant a leave of absence, however, either initially or at the time of renewal.[2] A board can deny a teacher's request for a leave for nearly any reason.

A controlling board also has the authority to grant without request an involuntary leave of absence, for a period not to exceed one year, because of physical or mental disability. This authority, like all others under the Tenure Act, is vested in the local controlling board and cannot be delegated to an administrator.

Placing a teacher on either a requested or an unrequested leave of absence relieves the controlling board of any obligation to compensate the teacher during the leave period.However, a school board may adopt a policy, or agree by contract, to pay all or part of a teacher's salary and/or fringe benefits under a sabbatical leave program, provided the teacher has taught in the district for seven consecutive years.[3]

Unrequested (Involuntary) Leave

A board of education may place any teacher on involuntary leave of absence, not to exceed one year, because of physical or mental disability. Boards are not free to require involuntary leaves without any constraints at all, however. Although the Act does not set out any specific requirements with regard to a board's initial decision to place a teacher on an unrequested leave, the Act is designed to prevent boards from removing teachers arbitrarily and capriciously.

The Act provides that "any teacher so placed on leave of absence shall have the right to a hearing on such unrequested leave of absence in accordance with the provisions for a hearing in article 4, section 4 of the act."[4] This clause was designed to provide a teacher placed on involuntary leave of absence the opportunity to contest the decision.

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[1] MCLA 38.112, MSA 15.2112.

[2] Miner v. Sch. Dist. Bloomfield Hills, TTC 79-27.

[3] MCLA 380.1235, MSA 15.41235.

[4] MCLA 38.112, MSA 15.2012.

Notice Requirements for Placing Teacher on Involuntary Leave of Absence

Formal notice, other than a letter stating the cause of the involuntary leave of absence, is unnecessary.[5] Nor is it necessary for the board to give the teacher sixty days' advance notice of the involuntary leave of absence.[6]

It has not been decided whether a controlling board has a legal obligation to furnish a teacher with a "statement of rights" under the Tenure Act when placing him on an involuntary leave, but it is strongly advised. This recommendation is based on the Tenure Commission's decision that a controlling board should have supplied such a statement when a teacher was denied an opportunity for an early return from a voluntary leave of absence.[7]

Hearing Rights Prior to Placement on Involuntary Leave

The question has arisen whether it is necessary for a board of education to hold a hearing before deciding to place a teacher on involuntary leave.[8] In *Rogers v. Trenton Board of Education*, the Court of Appeals held that "[t]he phrase (in the Tenure Act) 'that any teacher so placed on leave of absence shall have the right to a hearing' unequivocally indicates that the involuntary leave precedes the hearing and no pretermination hearing is contemplated."[9] In holding that a pretermination hearing is not constitutionally required, the Court stated: "[D]ue to the school board's obligation to the community and its students, it would be unreasonable to prohibit a board from taking the appropriate actions when necessary to temporarily remove a physically or mentally impaired instructor who cannot adequately discharge the classroom duties."[10]

The teacher in *Rogers* had missed numerous days of school due to an ophthalmological ailment. In one year she was absent 94 ½ days out of 187. After corrective surgery, she informed her school board that she could not return to work in September. In October she advised the district that she was not certain how long she would be out of work. She was then placed on involuntary leave and advised of her right to a hearing. She sued, claiming that the hearing should have been held before the leave was imposed. The *Rogers* Court also held that there is no federal constitutional right to a hearing before a board decides to place a teacher on an unrequested leave.[11]

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[5] Rogers v. Trenton Bd. Educ., 61 Mich. App. 682, 233 N.W.2d 141 (1975).

[6] Cox v. Ferndale Sch. Dist., TTC 72-35.

[7] Hambouz v. Brandywine Public Schs., TTC 75-30.

[8] Rogers v. Trenton Public Schs., 61 Mich. App. 682, 233 N.W.2d 141 (1975); Barker v. Dearborn Bd. of Educ., TTC 72-4; Rogers v. Trenton Bd. Educ., TTC 71-2.

[9] 61 Mich. App. 682, 686, 233 N.W.2d 141, 144 (1975).

[10] Id. at 689, 233 N.W.2d 141 at 145.

[11] Id. at 687-89, 233 N.W.2d at 144-45.

Purpose of Hearing

If a teacher wishes to have a school board hearing on the question of an involuntary leave of absence, he must request it.[12]

The purpose of a hearing on an involuntary leave of absence, if one is requested, is to require evidence that justifies the leave. A hearing provides the teacher with the opportunity to challenge the board's decision and to prevent arbitrary action. The Tenure Commission has stated that "the Act requires that, at a minimum, a board's initial decision to place a teacher on an involuntary leave be reasonable in light of the circumstances of that particular situation."[13]

In *Aslin v. Birch Run Area Schools*, the Commission explained why such hearings (called post-termination hearings) are provided:

> Appellant's concern over the potential danger of boards using an involuntary leave of absence to, in effect, discharge a teacher for twelve months without according the teacher any procedural safeguards is unfounded. Once a board has made the decision to place a teacher on an involuntary leave, the teacher has a right to a hearing to require proofs and evidence to justify the board's action. That hearing must be conducted with all the procedural safeguards of Article 4, Section 4, of the Act. Thus, the teacher's right to a hearing after the board has made its initial decision to place the teacher on involuntary leave is designed to prevent the abuse which concerns appellant.[14]

The Tenure Commission has jurisdiction over teachers' appeals of placement on an involuntary leave of absence.[15] In *Albert v. Troy School District*, the Commission ruled that the controlling board had failed to establish by a preponderance of the evidence that it had cause to place the teacher on unrequested leave.[16]

Requested (Voluntary) Leave

A teacher is not automatically entitled to a leave of absence by requesting one. It is clear from the Act that a controlling board has the option of approving or denying a requested leave of absence according to the best interests of the school district. Except as restricted by a collective bargaining agreement, the authorization or denial of leaves is a prerogative of management, and management's judgment will be upheld as long as the action is not unreasonable or discriminatory. Nothing in the Act grants a teacher a right to have a hearing on a denied request.

Despite the seeming simplicity of the voluntary leave provisions, several disputes about it have come before the Tenure Commission. One question is whether a board of education may grant a leave for a period longer than that requested by the teacher. In *Nickles v. Brown City Community Schools*,[17] a tenured teacher had requested a six-week leave but was granted a leave for six months instead. She tried to return to work after approximately six weeks, but was informed that she could not return to her teaching position. She requested a hearing, which was denied. On appeal to the Tenure Commission, the teacher argued that the board's refusal to permit her to return to her employment caused her to lose compensation, that the denial constituted a demotion, and that the refusal to grant a hearing denied her of the procedural due-process guarantees provided in the Tenure Act. The Commission held that nothing in the Tenure Act prevents a teacher from taking a leave of absence of less than one year, and that the board had no authority to deny the teacher's request to return to her employment upon the expiration of the leave. The board's action of granting a leave of six months rather than six weeks as requested constituted a demotion without a hearing. Thus, it is improper for a controlling board to authorize a leave of absence exceeding that which is requested.

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[12] Id.; Barker v. Dearborn Bd. of Educ., TTC 72-4.

[13] TTC 83-85 at 6. The Commission posed an interesting question in *Aslin*: "[W]hat remedy is appropriate when a board's initial decision to place a teacher on an involuntary leave is proper, but following a board hearing, the board later determines that the teacher should be returned to work?"

[14] Id. at 5.

[15] Smith v. Wyoming Public Schs., 128 Mich. App. 746, 341 N.W.2d 202 (1983).

[16] TTC 84-46

In *Hambouz v. Brandywine Public Schools*,[18] the question presented was whether a teacher had the right to terminate a voluntary leave of absence prior to its expiration and to be appointed to an open position. The Commission held that if a tenured teacher has agreed with the controlling board to a voluntary leave of absence, and there is no claim of subterfuge or bad faith, a board's failure to let the teacher return before that leave expires does not constitute a demotion under the Act.

The author recommends that when a teacher requests a leave, the time frame should be stated precisely; furthermore, the controlling board should either accept the leave for the period requested or reject the request. It is improper to accept the leave request but then change the beginning or ending dates. The board's decision should show mutual agreement with the terms of the requested leave.

Another important issue raised in *Hambouz* was whether the teacher must be informed of the denial to return. On this question, the Commission stated:

> We see no undue burden placed upon the controlling Board in requiring that where a teacher seeks to return from a leave of absence prior to its expiration, that the teacher be informed by the Board of its decision on whether or not it shall return the teacher to the classroom. *Further, should the teacher be denied the opportunity to return, a written statement of his/her rights under the Act should be included in the Board's decision.* Without such notification the thirty-day statute of limitations is tolled.[19]

In *Lyon v. Wyoming Public Schools*,[20] the teacher made placement in a specific school building a condition of her return. When her leave expired, no positions were available at her preferred location and she was not offered a position. The teacher argued that she should have been placed anyway. In support of her demand she cited an opinion of the Attorney General, which provides in pertinent part:

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[17] TTC 72-27.
[18] TTC 77-46.
[19] Id. at 3.
[20] TTC 77-37.

> [I]t is my opinion that a teacher on continuing tenure returning from a leave of absence is legally entitled to be re-employed in a teaching position for which he is legally qualified even though such re-employment requires the dismissal or demotion of a teacher not on continuing tenure.[21]

The board established that the teacher had requested reinstatement in a specific school and that no positions were available at that school; nor were probationary teachers employed there. The board asserted that it had not violated the teacher's rights by failing to reinstate her to a position in another school where probationary teachers were employed. The Commission held that if a teacher returning from a leave of absence specifies that he will accept placement only in a specific building, and no vacancies are available in that building, the controlling board is not obligated to offer him an assignment in another building. In sustaining the board's action the Commission stated:

> We find that Appellant would return only to Jackson Park. There were no positions available at that School. Appellee's actions thereafter regarding the DeBoer opening at Newhall were done in good faith and in reliance on Appellant's statements to the administration. We find Appellant's actions resulted in a waiver of her right to return to a comparable position on the expiration of her leave of absence. We conclude, as to Appellant Elizabeth Lyon, that there was no wrongdoing on the part of Appellee, nor do we find that Appellee has violated the tenure rights of Appellant.[22]

Right of Teacher to Return from a Leave of Absence

Once a teacher is placed on involuntary leave of absence or granted a requested leave, he has the right to return when the leave expires.[23] The controlling board must presume that the teacher will seek to return. If the board fails to return a tenured teacher at the expiration of a leave, the teacher is considered to have been discharged.[24]

In *Ross v. Mona Shores Schools*, the Tenure Commission discussed the right to return under MCLA 38.112, MSA 15.2012.

> [I]t is the opinion of this Commission that a presumption that the teacher will return to work upon termination of a leave must be assumed by the employing board of education

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[21] 1961-62, p. 264, OAG No. 3609 (Feb. 7, 1962).

[22] Lyon v. Wyoming Public Schs., TTC 77-37 at 17.

[23] Smith v. Wyoming Public Schs. TTC 80-12; Brown v. Bd. of Educ. Marshall Public Schs. TTC 78-33; Saad v. Fraser Public Sch. Dist., TTC 79-19; Bebeau v. Van Dyke Public Schs., TTC 78-37; Lyon v. Wyoming Public Schs. TTC 77-37; Ross v. Mona Shores Schs., TTC 75-30; Jones v. Wyandotte City Sch. Dist., TTC 72-43. See also 1961-62, p. 262, OAG No. 3609 (February 7, 1962).

[24] Bebeau v. Van Dyke Pub. Schs., TTC 78-37 at 5.

> unless an extension of the leave is requested or notice of discontinuance of services is served on the board of education by the teacher on leave.
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> The record in the instant case reveals that Appellant was certified and qualified for available positions in Appellee School District; thus, it is this Commission's decision it was the affirmative responsibility of the Appellee to offer one of these positions to Appellant at the termination of her leave of absence. The record further shows that, during the ensuing period, vacancies were filled by probationary teachers that could have been held by Appellant.[25]

The Tenure Commission has stated that "[t]he Teachers' Tenure Act does not countenance the proposition that a request for a leave of absence is a resignation with the mere hope of future rehire."[26]

The right to return from a leave, however, is not absolute. There are at least three types of circumstances in which it does not exist: (1) if charges have been filed against the teacher and he is suspended from duty; (2) if it is necessary to terminate services to reduce personnel; and (3) if the teacher was placed on an unrequested leave for physical or mental disability. (The latter presumes that a leave absence can be renewed).Unless one of these events has occurred, the teacher returning from a leave of absence must be placed in a classroom position comparable to the one he left.[27] There is no violation of the Tenure Act, however, if a controlling board places the teacher in a different grade or class.[28]

Notice of Intent to Return from Leave

This issue involves two questions: (1) May a school board require a teacher returning from leave to provide notice of intent sixty days before the close of the school year for which the leave was granted? (2) What are the legal principles involved in applying "intent to return" notice requirements that have been incorporated in collective bargaining agreements?

Timing of Notice of Intent to Return

In *Brown v. Marshall Public Schools*,[29] the controlling board argued that a teacher returning from leave who would replace a probationary teacher must inform the board more than sixty days prior to the close of the school year preceding his return. The argument was based on the Tenure Act's requirement that a board is required to provide probationary teachers with timely notice of their termination.[30] The board in this case asserted that it needed the information in early spring in order to make staffing decisions for the coming school year. If the notice of intent to return is not given, the board argued, the district may be obligated to pay unemployment compensation or award tenure to the replaced probationary teacher. In rejecting the board's argument, the Commission stated:

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[25] TTC 75-30 at 3.
[26] Bebeau v. Van Dyke Public Schs., TTC 78-37 at 5.
[27] Brown v. Marshall Public Schs., TTC 78-33 at 14.
[28] Ross v. Mona Shores Schs., TTC 75-30; Purcell v. Ferndale Sch. Dist., TTC 76-56.
[29] TTC 78-33.
[30] MCLA 38.83, MSA 15.1983.

> We find this argument of novel design, but of little merit. The board, in granting a leave of absence, knows the duration of the leave provided. Further, the board, as employer, has actual knowledge of the status, probationary or tenured, of the employee hired to replace Appellant during the term of the leave. We find no statutory duty, actual or implied, that requires a teacher returning from a leave of absence to provide notice of a return date, since the date is set when the leave is granted. Such notice provides little benefit or assistance to the board, and does not provide information to the Board that it does not already have. We do not find the Board's argument compelling that the public interest would be served by such a requirement. Common sense indicates the imposition of such a duty to be frivolous and without substantial merit.[31]

Negotiated "Intent to Return" Notice

It is common practice to incorporate a requirement in a collective bargaining agreement that teachers who are on leave must either inform the district of their intent to return for the next school year or seek extension of the leave by a certain date.[32] The employer needs this information in order to make staffing decisions. The following is an example of such contract language.

> Those individuals on leave of absence must inform the Personnel Office of their intent to return, or request an extension, if eligible, on or before April 1 of the school year during which the leave of absence is in effect. Individuals on leave of absence who do not notify the Personnel Office on or before April 1 will be considered as having voluntarily resigned.

Of course, such a provision may not conflict with the Teachers' Tenure Act, because MCLA 38.112, MSA 15.2012, provides that "no leave of absence shall serve to terminate continuing tenure previously acquired under this act." The Act also includes a statement, in MCLA 38.111, MSA 15.2011, that no teacher on continuing tenure shall terminate his or her services except by "mutual consent." The Michigan Court of Appeals has also stated:

> Initially, we observe that the April 1 deadline for notifying the district of an intention to continue employment was a reasonable, negotiated condition of employment that is not inconsistent with the teacher tenure act's requirement of consent to terminate employment. We believe the deadline was necessary to enable the district to anticipate person-

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[31] Brown v. Marshall Public Schs., TTC 78-33 at 12.

[32] See Kramer v. Van Dyke Public Schs., Mich. App. , N.W.2d (1986) for discussion of an extension of a leave of absence in violation of provisions in a collective bargaining agreement rather in violation of the Tenure Act.

nel needs for the approaching school year. The teacher tenure act's requirement of consent, however, remains, regardless of contractual notice provision.[33]

In *Bloomfield Hills Board of Education v. Miner*, the teacher on leave had failed to notify the district of her intent to return by the contractually required April 1 deadline. After the deadline passed, the personnel director informed her that the district was operating under the assumption that she had resigned. Miner then immediately and repeatedly attempted, without success, to contact the district's personnel director by telephone. On April 4, she informed the director's secretary that she had no intention of resigning.About May 1, the personnel director informed Miner that he was unable to restore her to her position, as he was bound by the contract.On May 7 the board acted to accept her "resignation." She was informed of this decision by letter; a statement of Tenure Act rights under MCLA 38.121, MSA 15.2021 was appended. Miner appealed the board's decision to the Tenure Commission.

In defense of its decision, the district argued that the collective bargaining agreement irrevocably created "mutual consent" to resign whenever the conditions set out in the contract occur. The district argued that Miner had voluntarily resigned because she had failed to submit timely notice of her intent to return to work or to request an extension. The district asserted that Miner had known of her duty to act and had been aware of the consequences of her inaction. Therefore, the district contended, Miner had intended her failure to provide notice to represent her voluntary resignation.

The Court of Appeals rejected the district's argument and stated:

> The school district asks that we interpret the teacher's failure to respond by the contract deadline as *irrebuttable* evidence of consent. In effect, the school district asks that we make this a test case of whether or not a school district and a union may, in a collective-bargaining agreement, provide that failure to respond by a certain date *in every circumstance* is *irrebuttable* evidence of a teacher's consent to resign. On the limited facts before us, we decline to hold so broadly. To begin with, we do not find the relied upon language of Article XXIII, S. E, quoted *supra*, as creating an irrebuttable presumption. The language reads "will *be considered* as having voluntarily resigned." It does not read "irrevocably considered," nor does it state that "failure of individuals on leave of absence to notify the personnel office on or before April 1 shall constitute voluntary resignation." Such provisions would create an irrebuttable presumption. The actual wording is less specific and lends itself to being interpreted as a rebuttable presumption of resignation which the teacher could overcome upon presentation of proof that she did not intend to resign.[34]

Miner was able to offer several proofs that she had not consented to the resignation. First, although the district routinely informed teachers, upon granting a leave of absence, that the contract contained provisions affecting their right to return following the leave, the letter to Miner approving her leave did not specifically outline the procedures to be followed or the consequences of noncompliance.

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[33] Bloomfield Hills Bd. of Educ. v. Miner, 113 Mich. App. 388, 390-91, 317 N.W.2d 638, 640 (1982; Miner v. Bd. of Educ. Bloomfield Hills, TTC 79-27.

[34] Id. at 393, 317 N.W.2d at 641.

Second, the district had made it a practice in the past to warn any teacher on leave of absence that the notification date was approaching and to solicit the teacher's response. The Court found that the absence of any reminder from the school district was strong evidence that Miner's inaction did not constitute consent to the termination of her employment. Third, although the district asserted that a warning letter had been sent to Miner, it could not produce a copy—an oversight that ignored the procedure followed in previous years. Fourth, the district's personnel director did not inform the executive director of the teachers' bargaining unit of Miner's failure to respond, contrary to past practice. Fifth, Miner's prompt action upon receipt of the personnel director's letter supported her contention that she did not intend to resign. The Court held that the facts failed to establish that Miner had intended to resign.

The decision in *Miner* offers several guidelines that school officials and teacher organization leaders may wish to consider in administering return from leave of absence.

First, as recommended by the Court of Appeals, any collective bargaining agreement on leaves of absence should contain a statement to the effect that "failure of individuals on leave of absence to notify the personnel office on or before (a certain date) shall constitute an *irrevocable* voluntary resignation."

Second, upon granting a leave of absence, the district should inform the teacher in writing of the collective bargaining agreement's provisions affecting his right to return following the leave, and it should both outline the procedures the teacher must follow in order to inform the district of his intent and state the consequences of noncompliance. A copy should be retained and one copy sent to the collective bargaining agent.

Third, a district should warn a teacher on leave of absence when the notification date is approaching and solicit the teacher's response. This notice should be sent by mail (and there should be written acknowledgment that it has been received) and a copy retained.A copy should also be sent to the collective bargaining agent.

Fourth, if a teacher fails to respond promptly to the warning letter, the collective bargaining agent should be informed so that the union can assist in encouraging the teacher to notify the district of his intent before the deadline has passed.

Fifth, if timely notice of intent to return is not received, the district should inform the teacher, by receipted mail, that his voluntary resignation has been accepted and append a statement of his rights under the Tenure Act.

A teacher on leave should inform the district of any change in address and, of course, respond promptly to any district request regarding his intentions to return, or request an extension.

Board's Requirements for Denying Placement When Leave Expires

If the controlling board decides not to return a teacher to classroom duty when his voluntary or involuntary leave of absence expires, the board must give the teacher written notification of this decision, accompanied by a statement of the teacher's rights under the Tenure Act. The board must specify to which of its decisions the statement of rights is applicable.[35] The board must also supply the teacher with a list of any vacancies. If notice, statement of rights, decisions to which the statement of rights is applicable, and a list of vacancies are provided, a thirty-day period begins on the date the notice is served on the teacher, during which the teacher may appeal the decision to the Tenure Commission. Failure to provide the teacher with these items will stay the running of the thirty-day appeal period. When the teacher receives a statement of his rights under the Tenure Act, it is incumbent upon him to respond within the thirty-day appeal period in order preserve his rights.

These requirements are safeguards for the teacher; they prevent the board of education from using subterfuge to thwart the teacher's return.[36] A board cannot fulfill these procedural obligations by asserting that the teacher had actual knowledge, prior to the start of the leave, that he could not be returned until an available position opened.[37]

The Commission has held that if a teacher returning from leave is denied a position, there is no statutory right to a hearing before the controlling board, but the teacher may appeal to the Tenure Commission under MCLA 38.121, MSA 15.2021.[38]

Rights of Teachers Returning from Leave During Staff Reduction

As the Commission has stated, a tenured teacher returning from a leave of absence has a statutory right to be reemployed:

> [A] tenured teacher has a right to reemployment upon expiration of his or her voluntary leave of absence unless charges are filed, a necessary reduction in personnel occurs, or an involuntary leave is imposed under Article V, Sec. 2 of the Act.[39]

This right to reemployment, however, may be affected by the district's need to reduce staff. Placement under these circumstances may be complicated. The principles involved when a teacher seeks to return from a leave during a time when the district is also involved in layoff and recall are similar to those involved when reviewing the reemployment of teachers after a period of staff reduction.

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[35] Kramer v. Van Dyke Schs., 135 Mich. App. 479, 351 N.W.2d 572 (1984).
[36] Lyon v. Wyoming Public Schs., TTC 77-37.
[37] Brown v. Marshall Public Schs., TTC 78-33.
[38] Lyon v. Wyoming Public Schs., TTC 77-37.
[39] Glynn v. Millington Community Schs., TTC 79-24 at 4.

The rights of a teacher returning from a leave of absence during staff reduction are embodied in the Tenure Act and in the collective bargaining agreement of the teacher's district.

Negotiated "Return from Leave of Absence" Provisions

If a staff reduction occurs after a teacher goes on leave, that teacher's right to return—when the leave expires—to a position for which a laid-off tenured teacher is also eligible is subject to the Tenure Act and those provisions in the district's collective bargaining agreement that are not in conflict with the Act.[40]

In *Brown v. Board of Education Marshall Schools*,[41] the board argued that, pursuant to the provisions of a collective bargaining agreement, it was not obligated to reemploy a teacher returning from leave even though there was an appropriate position already held by a probationary teacher. The Commission held that the terms of a collective bargaining agreement could not waive his right to return. The Commission stated that "[t]hose sections of the contract not in accord with the mandatory provisions of the Act are void."[42] In support of its ruling, the Commission quoted with approval from a New York State decision wherein the Court reviewed a provision of a collective bargaining agreement that contravened a statute. The Court stated:

> [C]ollective agreements as to terms and conditions of employment control the public employer-employee relationship except in cases where some other applicable statutory provision explicitly and definitively prohibit the public employer from making an agreement as to a particular term or condition of employment. *Johnson v. Nyquist*, 361 NYS 2d 431 (1974).[43]

A school board is not required to break a contract with a nontenured teacher and terminate him in midyear in order to accommodate a tenured teacher returning from leave of absence.[44] The Commission has not always followed this rule, however. In *Smalley v. Flint Board of Education*,[45] the Commission ruled that the language in the collective bargaining agreement controlled. The Commission later explained its *Smalley* decision in its decision in *Brown v. Marshall Schools*:

> In *Smalley*, the Appellant was not returned to the classroom after a maternity leave. The controlling Board argued the contract controlled. It permitted the Board to place a teacher back into the classroom *if a vacancy existed*. We found that the teacher in question had been placed on maternity leave pursuant to the contract. The contract

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[40] The order-of-assignment provisions of the district's master agreement cannot contradict the provisions of the Tenure Act. For example, a tenured teacher returning from leave of absence would, despite any provisions of a master agreement, be entitled ahead of any probationary teacher to a position for which the tenured teacher was certified and qualified.

[41] TTC 78-33.

[42] Id. at 19.

[43] Id.

[44] 1961-62, p. 264, OAG No. 3609 (Feb. 7, 1962).

[45] TTC 76-43.

> required a leave of, at minimum one full semester. The teacher sought to return prior to the end of that leave period.
>
> This Commission held that once the teacher was certified by a physician's statement that she was able to return, her rights to return, if any, were controlled by the contract. The terms of the contract did not violate the Tenure Act. Nor was the Act violated by the Board's failure to breach its contract with then employed probationary teachers holding positions for which Appellant was certified and qualified.
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> We have reconsidered our decision in *Smalley*. Upon our review, and in light of the arguments presented in the instant case, we find that opinion does not control our decision here. In *Smalley*, we found that the contract provisions controlled. We find that the clear language of the Act, as well as its legislative purpose, provide that the Act should control.[46]

Board Action Required When a Teacher Cannot Be Placed

If the teacher cannot be assigned to a position upon expiration of a leave, the board must take appropriate action. In *Bebeau v. Van Dyke Public Schools*, the Commission stated that "[i]f a tenured teacher (on leave of absence) cannot be re-employed because there are no appropriate positions available, the School Board's proper cause of action, under the Teacher's Tenure Act is to place the teacher on lay-off status under the provisions of MCLA 38.105."[47] In *Bebeau*, the teacher had requested and received a one-year leave of absence.The board declined to reinstate him at the end of the year because it had reduced staff and there were now no vacancies. The teacher was never notified that his leave was being extended or given a statement of his rights.He received no response to his written request for a hearing. The board contended that the teacher was still on leave. The Commission found this assertion unacceptable, holding that:

> [I]f the school district had suffered a necessary reduction in personnel during Appellant' absence, or if Appellant's return from his leave of absence created a surplus of tenured teachers for available positions, Appellee should have made the decision to place Appellant on layoff status.Appellee's failure to do so denied Appellant a substantial right established by the Act—the right to be appointed to the first appropriate vacancy.[48]

The action of the board in *Bebeau* treated teachers on leave of absence as if they were a subclass with respect to their recall rights. The board's decision had in effect terminated Bebeau's employment, discharging him without charges, notice, or hearing and without a finding of reasonable and just cause.

A controlling board must classify a teacher returning from leave among the pool of actively employed teachers, teachers already on layoff awaiting recall, and other teachers returning from leave. When a teacher's leave expires, he must be considered for assignment for the following school year as if he had been employed during the past year. If the district is reducing personnel, the teacher returning from a leave of absence must meet the district's layoff and recall qualification criteria. Otherwise his services may be terminated due to a necessary reduction in personnel.

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[46] TTC 78-35 at 18.
[47] TTC 78-37 at 6.
[48] Id. at 6-7.

An important issue related to leave of absence is whether a school district may use former leave status as a basis for deciding which tenured teachers to lay off.

The Teachers' Tenure Act does not specify the standards a controlling board must use in selecting the tenured teacher to lay off during a necessary reduction in staff. Boards of education and teacher organizations often include qualification criteria for layoff and recall purposes in a collective bargaining agreement. Shown below is an example of former leave status as a criterion for placement:

> When leaves are extended beyond one year, a teacher may return to a position for which he or she is qualified, provided there is a vacancy for which the teacher is certified.[49]

If a school board followed a provision similar to the one above, extended leave status, as a qualification criterion, would be subordinated to all other criterion including seniority. The teacher returning from leave would have a right to placement only if a vacancy existed and only after all other teachers had been placed.

Use of former leave status as a qualification criterion has been disputed in two Michigan school districts. In *Smith v. Wyoming Public Schools*,[50] the Tenure Commission sharply criticized the Wyoming district's use of former leave status as a qualification criterion for layoff purposes. The Commission determined that the controlling board had made an error by failing to consider the teacher returning from leave among the pool of actively employed teachers and that, had it considered her among them, her services would not have been terminated. The Commission concluded that the use of former leave status as a selection standard denies teachers returning from leave the same rights to reemployment and placement as teachers who have not taken a leave. The Commission said that the teacher's acceptance of a benefit (leave of absence) that is protected by the Tenure Act could be limited by the board decision. This conduct, the Commission stated, "results in a substantial decrease of the right of continuing employment for a teacher whose leave of absence has expired."[51] The Court of Appeals overturned the Commission's *Smith* decision and stated:

> The commission held that the practice of using former leave status as a basis for laying off a tenured teacher violates one of these rights. The practice deprives the teacher of her right to "continuing employment." We disagree with that conclusion. A tenured teacher may have her services terminated due to economic necessity. See MCL 38.105;

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[49] LakeVille Community Schs., Collective Bargaining Agreement for 1983-86, Art. 17, C(2).
[50] TTC 80-12.
[51] Id. at 9.

> MSA 15.2005. Where a school board must decide whom among tenured teachers to layoff, the TTA guarantees none a right to continuing employment. A tenured teacher cannot be denied a right that she does not have. As such, a school board's use of certain selection criteria—including former leave status—in its decision to layoff particular tenured teachers does not deprive those teachers of any "right" to continuing employment.
>
> On the record before us, we find that the respondent's use of petitioner's former leave status in its decision to terminate her services due to economic necessity did not violate the Teachers' Tenure Act.[52]

Following the Court of Appeals decision in *Smith*, the Tenure Commission determined, in *Starrs v. Linden Community Schools*,[53] that the use of former leave status to select teachers for layoff did not violate the tenure rights of those teachers. In *Starrs*, however, the Commission did not consider the question of whether former leave status could be used as a qualification standard for denying recall. Subsequently, the Commission granted rehearing to consider the validity of leave status as a qualification criterion.[54]

After rehearing, the Commission rejected the argument that the Court of Appeals decision in *Smith* negated the need to consider the reasonableness of former leave status as a selection criterion. The Court's decision in *Smith*, the Commission said, did not touch upon the Tenure Act's provision that qualification criteria used in recall determinations be neither arbitrary nor capricious.[55]

In its second decision in *Starrs* the Commission again rejected the use of former leave status as an objective test for distinguishing between teachers. The Commission stated:

> [We] find that subordinating the recall rights of teachers formerly on leave status is unreasonable. The practice bears no rational relationship to improved teacher competency nor does it necessarily allocate the economic burden of layoff fairly. Further, it clearly penalizes teachers for their previous acceptance of a statutorily protected benefit.[56]

Maternity Leaves

Most voluntary leaves are for reason of pregnancy and/or child care. Nearly all of the Tenure Commission voluntary leave cases have concerned maternity leaves. Several nontenure court decisions and federal statutes control some aspects of maternity leaves. These legal references establish the principle that mandatory and fixed times for pregnancy leaves are discriminatory and unconstitutional.

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[52] Smith v. Wyoming Pub. Schs., 128 Mich. App. 746, 749, 341 N.W. 2d 202, 203 (1983).
[53] TTC 82-33.
[54] Starrs v. Linden Community Schs., TTC 82-33-2 and TTC 82-54-2.
[55] Chester v. Harper Woods Sch. Dist., 87 Mich. App. 235, 273 N.W.2d 916 (1978).
[56] Starrs v. Linden Community Schs., TTC 82-33-2 and TTC 82-54-2 at 8.

At issue in a *Kewin v. Melvindale Board of Education,*[57] a non-tenure case, was whether a board of education and a teachers' union can legally enforce a negotiated requirement that a teacher's pregnancy leave must continue for four months after the child is born.The U.S. Supreme Court had struck down maternity leave provisions nearly identical to those in *Kewin*, holding that that the school board's rules regarding leaves of absence at mandatory and fixed time periods—if they have no rational relationship to any legitimate school interest—violate the due-process clause of the Fourteenth Amendment of the U.S. Constitution.

Two cases had been involved in this one appeal to the Supreme Court. In both, school district rules required mandatory leaves at a fixed time early in pregnancy; each district also required a physician's statement before the teacher could return to work. The Court said that since there was no rational relationship to any legitimate school interest, the rules were unconstitutional. The Court dismissed arguments advanced in defense of the rules—such as continuity of classroom instruction, physical capability of teachers to teach, and protection of the health of the teacher and her unborn child—saying that these arguments only presumed the teacher could not teach beyond a certain arbitrary date. In fact, the Court noted, such rules could on occasion work against continuity—for instance, if a teacher is forced to take a leave in mid-semester.

The test established in this case and other similar cases is that the maternity policy, in order to be valid, must bear a rational relationship to legitimate school interests. If there is such a relationship, the policy will pass constitutional examination. If there is not, it is unconstitutional and cannot be enforced.[58]

In *Kewin*, the Michigan Court of Appeals rejected the school board's argument that since the teachers' bargaining representative had consented to the maternity provisions, the policy was permissible. This highly personal right, which, the Court held, is well rooted in our Constitution, cannot be bargained away. The board, which had relied on the language in the master agreement and refused to allow the teacher to resume her duties, was required to compensate the teacher for wages lost.

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[57] 65 Mich. App. 472, 237 N.W.2d 514 (1975).

[58] Cleveland Bd. of Educ. v. LaFleur, 414 U.S.632, 94 S.CT. 791, 39 L.Ed.2d 52 (1974).

CHAPTER VII

Discharge, Suspension and Demotion of Tenured Teachers

The discharge or demotion of a tenured teacher can be accomplished by following "due process," proving reasonable and just cause. Due process is a broad concept that is not easily defined. Daniel Webster's definition is perhaps the most wellknown: "[A] law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."[1]

Reasonable and Just Cause Defined

Definitions of reasonable and just cause have depended primarily on arbitration awards for analysis, and the courts have applied similar standards. Until recent years little could be learned from court decisions in this state to explain the meaning of reasonable and just cause as applied to dismissals or demotions of classroom teachers for ineffectiveness. In 1976, a panel of the Michigan Court of Appeals noted that "[a]lthough just and reasonable cause is crucial to the teachers' tenure scheme, this concept has received little judicial explanation in this jurisdiction."[2]

Just cause includes any good cause related to the teacher's fitness or capacity to discharge the duties of his position, that is not arbitrary, irrational, unreasonable, or irrelevant to the board's responsibility of building up and maintaining an efficient school system. Good cause has been defined as "failure of an employee to perform his duties in the scope of his employment in such manner as a person of ordinary prudence in the same employment would have performed under the same or similar circumstances."[3] Good cause includes incompetency or inefficiency, insubordination, unprofessional conduct, absenteeism, crimes against the employer, intoxication, and disruptive conduct.

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[1] Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat) 418, 581 (1819).

[2] Beebee v. Haslett Bd. of Educ., 66 Mich. App. 718, 723, 239 N.W.2d 724, 727 (1976).

[3] Ingram v. Dallas County Water Control and Improvement Dist., 425 S.W.2d 366, 367 (Tex. Civ. App. 1968).

Incompetency Defined

A court in another state provided the following statement regarding the elements that constitute teacher incompetency:

> It is not feasible to classify and assign any particular weight to the factors constituting incompetency in the classroom since, as a practical matter, the causes sustaining a finding of incompetency upon the part of the teacher demonstrate that the incompetent teacher is rarely deficient in one respect alone; rather, incompetency seems to manifest itself in a pervasive pattern encompassing a multitude of sins and bringing in its wake disorganization, dissatisfaction, disharmony, and an atmosphere unproductive for the acquisition of knowledge or the attainment of any other ancillary benefit.[4]

The Tenure Commission has formulated the following standard for reviewing charges of incompetency (character of professional services provided):

> Our review of the law discloses that the charge of incompetence is the result of a finding by school officials of a pervasive pattern of behavior resulting in a lack of classroom organization and harmony and dissatisfaction on the part of the pupils and supervising authorities. . . In the majority of cases this Commission has reviewed, a number of charges regarding various aspects of the teacher's performance were combined to establish the charge of incompetence and held to justify the teacher's discharge. Incompetence we find is a multi-faceted charge incorporating a number of factors in varying degree. Further, the general rule requires that a teacher must be given an opportunity to correct the alleged deficiencies before the charge will be upheld.
>
> What are the factors which go into the finding of incompetency? In this jurisdiction, one court in discussing incompetence as just and reasonable cause for discharge held ". . . .it can be shown only by significant evidence proving that a teacher is unfit to teach." *Beebee v. Haslett Public Schools*, 66 Mich App 718, 239 NW 2d 724 at 728 (1976). Such a finding requires a showing of adverse effect on students, other teachers and school staff.[5]

Specifically enunciated professional standards or legislative or judicial explanations of reasonable and just cause do not exist. The Tenure Commission has issued decisions on a case-by-case[6] basis, refering to statements in legal references and court decisions.[7]

In *Beebee v. Haslett Public Schools*, the Court set forth five basic criteria that should be used to judge teachers:

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[4] Conley v. Bd. of Educ., 143 Conn. 488, 123 A.2d 747 (1956)

[5] Niemi v. Kearsley Community Schs., TTC 74-36-R at 4-5.

[6] Commission decisions on incompetency include: Private Case, TTC 85-13; Nelson v. Ecorse Public Schs., TTC 83-87; Fortson v. Detroit Bd. of Educ., TTC 83-47; Private Case, TTC 82-52; Clark v. Saginaw Bd. of Educ., TTC 82-43; Wolff v. Benton Harbor Area Schs., TTC 80-31; Cooper v. Oak Park Sch. Dist., TTC 80-15; Knox-Brown v. Benton Harbor Area Schs., TTC 79-41; Graham v. Trenton Public Schs., TTC 78-12; Cameron v. Algonac Community Schools, TTC 77-25; Beyers v. St. Ignace Sch. Dist., TTC 77-17; Sharkey v. Oak Park Sch. Dist., TTC 74-41; Sprik v. Grandville Public Schs., TTC 74-40-2-R; Niemi v. Kearsley Community Sch. Dist., TTC 74-36; Wildfong v. Comstock Public Schs., TTC 74-26-R; Woolworth v. Lowell Public Schs., TTC 74-3; Chesher v. Coldwater Community Schs., TTC 73-56-R; and Beebee v. Haslett Schs., TTC 68-13-R.

[7] Michigan appellate court decisions on incompetency include: Long v. Bd. of Educ. Oak Park, 350

> [S]chool boards and the Tenure Commission should, in each case, make specific determinations concerning the challenged teacher's knowledge of his subject, his ability to impart it, the manner and efficacy of his discipline over his students, his rapport with parents and other teachers, and his physical and mental ability to withstand the strain of teaching.[8]

The board must establish by a preponderance of the evidence that the teacher is unfit in one of these five areas.

The test for fitness to teach is not limited to classroom performance.In *Beyers v. St. Ignace School District*, the Commission stated:

> The *Beebee*, supra, Court was discussing incompetence in the classroom, the use of a particular curriculum or methodology. We believe, however, that the fitness test applied by the *Beebee* Court is not limited to only classroom performance. It includes not only instructional abilities, but those ministerial and quasi-administrative duties a teacher is called upon to perform. Preparation of classroom reports and adherence to the statutory and regulatory responsibilities related to a given teacher position are as important in determining overall competency as classroom performance.[9]

Under certain circumstances, discipline or discharge may be warranted on the basis of "reasonable and just cause" without reference to pre-established objective criteria. Dismissal for conduct that is repugnant to the minimum standards of honesty and integrity require no prior notice.This is because certain offenses, such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the district or of fellow employees are so serious that any employee in education may properly be expected to know already that such conduct is offensive and punishable.[10]

Mich. 324, 86 N.W.2d 275 (1957); Beebee v. Haslett Schs., 406 Mich. 224, 278 N.W.2d 37 (1979); Rehberg v. Ecorse Sch. Dist. No. 11, 345 Mich. 731, 77 N.W.2d 131 (1956); Memphis Community Schs. v. Henderson, Mich. App. , N.W.2d (1986); Comstock Public Schs. v. Wildfong, 92 Mich. App. 279, 284 N.W.2d 527 (1979); Beebee v. Haslett Public Schs., 66 Mich. App. 718, 239 N.W.2d 724 (1976); Luther v. Alpena Bd. of Educ., 62 Mich. App. 32, 233 N.W.2d 173 (1975);

[8] Beebee v. Haslett Public Schs., 66 Mich. App., 718, 726, 239 N.W.2d, 724, 729 (1976) (emphasis added). This quote cites the five standards of incompetence. The Commission held that it is not necessary that all five factors be established to support a charge of incompetence. Any one, or a combination, is sufficient. Niemi v. Kearsley Sch. Dist., TTC 74-36.

[9] TTC 77-17 at 15.

[10] See Annot., Use of Illegal Drugs as Ground for Dismissal of Teacher, or Denial or Cancellation of Teacher's Certificate, 47 A.L.R.3d 754 (1973); Dismissal of, or Disciplinary Action Against, Public School Teacher for Violation of Regulation as the Dress or Personal Appearance of Teachers, 58 A.L.R.3d 1227 (1974); Dismissal or Rejection of Public School Teacher Because of Disloyalty, 27 A.L.R.3d 487 (1969); What Constitutes "Incompetency" of "Inefficiency" as a Ground for Dismissal or Demotion of Public School Teachers, 4 ALR3d 1090 (1965); Sexual Conduct as Ground for Dismissal of Teacher or Denial or Revocation of Teaching Certificate, 78 A.L.R.3d 19 (1977); What Constitutes "Insubordination" as Ground for Dismissal of Public School Teacher, 78 A.L.R.3d 19 (1977); Dismissal of Public School Teacher Because of Unauthorized Absence or Tardiness, 78 A.L.R.3d 117 (1977); Rosenberger and Plimpton, *Teacher Incompetencies and the Courts*, 4 J. L and Educ. 469 (1975); Dale L. Bolton, *Evaluation of Administrative Personnel in School Systems* (New York: Teachers College Press, 1980) Dean L. Webb, "Teacher Evaluation", in *Educators and the Law*, ed. Stephen V. Thomas, Nelda H. Cambron-McCabe, and Martha M. McCarthy (Elmont. N.Y.: Institute for School Law and Finance) 1983, pp. 69-80.

Need to Show Adverse Effect

In *Beebee v. Haslett Board of Education*,[11] the Court of Appeals stated that "[i]n each case, the effect on the school and its students of the acts alleged to require dismissal must be delineated." The Court adopted the rationale and guidelines of the California Supreme Court decision in *Morrison v. State Board of Education*.[12]

> In determining whether the teacher's conduct thus indicates unfitness to teach the board may consider such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect on the constitutional rights of the teacher involved or other teacher. These factors are relevant to the extent that they assist the board in determining whether the teacher's fitness to teach, i.e., in determining whether the teacher's overall impact on his students is likely to meet the board's standards.[13]

It should be noted that the Court of Appeal's decision in *Beebee* was reversed.[14] The Supreme Court upheld the *Findings of the State Tenure Commission* that were issued by the Commission pursuant to the Supreme Court's order of remand.[15] The Commission's *Findings* followed the Court of Appeal's rationale in *Beebee*, concluding that incompetence was established by the controlling board's showing that ineffective classroom control, which had endangered student safety, adversely affected the students in Beebee's classroom. Thereafter, the Commission stated in *Cameron v. Algonac Community Schools*:

> We believe. . . . that the Court of Appeals rationale and the factors set out for determining the issue of incompetency are still applicable. Further, these factors as discussed in *Niemi*, supra, are looked to in the majority of jurisdictions when determining the issue of incompetence. We do not find that our reliance on these and other factors is a contradiction of the Supreme Court's decision in *Beebee*.[16]

Whether adverse effect must be shown has been an issue recently. In deciding this, the Court of Appeals in *Clark v. Ann Arbor School District*,[17] found 1) that the Court of Appeals panel in *Beebee* did not intend to lay down a flat rule requiring proof of adverse effect in all tenure cases, and 2) that even assuming such a rule, its continuing validity is doubtful after the reversal of *Beebee* by the Supreme Court. The *Clark* panel stated, "While it is questionable what, if anything, is left of the Court of Appeals 'adverse effects' rule, at a minimum. . . . it is not the broad rule urged by petitioners."[18] The panel then reviewed cases where courts found that adverse effect could be presumed or where the status of the parties could support a finding of unfitness to teach because of unprofessional relations with students. In *Clark*, the Court upheld the teacher's discharge because the teacher had maintained an unprofessional relationship with a student, although the Tenure Commission had failed to find sexual misconduct.

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[11] 66 Mich. App. 718, 726, 239 N.W.2d 724, 729 (1976).
[12] 1 Cal.3d 214, 461 P.2d 375, 82 Cal. Reptr. 175 (1969).
[13] Beebee v. Haslett Public Schs., 66 Mich. App., 718, 725-26, 239 N.W.2d 724, 728 (1976).
[14] Beebee v. Haslett Public Schs., 406 Mich. 224, 278 N.W.2d 37 (1979).
[15] 401 Mich. 954 (1977).
[16] TTC 77-25, footnote 5.
[17] 130 Mich. App. 681, 344 N.W.2d 48 (1983).

After examining the Supreme Court's opinion in *Beebee*, the Tenure Commission concluded that it could "find no clear indication that the adverse effects standards adopted by the Court of Appeals panel were either approved or discarded."[19] The Supreme Court in *Beebee* clearly did make findings of adverse effect:

> There may be reasonable and just cause for dismissal if there is substantial evidence that the teacher's classroom is significantly more disorderly or unsafe than would be reasonably expected. In the instant case, there was more than sufficient evidence that plaintiff's classroom was lacking in control and safety more often than would be reasonably expected in any kindergarten classroom, including one utilizing plaintiff's particular pedagogical method.
>
> Furthermore, the testimony supports the Commission's finding that plaintiff was made aware of the problem by the administration and that she refused to cooperate. Such refusal was detrimental to the proper functioning of the administration and the school system.[20]

Based on this, a board of education should support a charge of incompetency with findings of adverse effect that impairs the functioning of the school system.

Evaluation Guidelines

The role of the Tenure Commission is to protect teachers from arbitrary and capricious actions of their employers. In fulfilling this obligation, the Commission will carefully review a board of education's decision to demote or discharge a teacher for incompetence. One court described this responsibility this way: "Allegations of incompetence or evident unfitness for teaching are broad terms and ones that should be closely scrutinized when offered as a ground for teacher dismissal."[21] The Commission also has a second duty: The rights of teachers must be weighed against the interests of the public and students for competent instruction. A teacher's performance may not be detrimental to the teaching process or disruptive to learning in other classrooms.

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[18] Id. at 688, 344 N.W.2d at 51.

[19] Mabry v. Wyoming Public Schs., TTC 83-21 at 18.

[20] Beebee v. Haslett Public Schs. (after remand), 406 Mich. App 224, 233-234, 278 N.W.2d 37, 41 (1979).

[21] Adams v. Clarendon County Sch. Dist. No. 2, 241 S.W.2d 897, 901 (SC 1978).

Even though the terms "incompetence" or "evident unfitness to teach" are broad, the professional duties of teachers are well known. Among these responsibilities of a teacher are the following: 1) to establish a positive environment; 2) that motivate students; 3) to gain the respect of students; 4) to achieve and maintain control over the classroom; 5) to conduct teaching in a manner that meets the needs of students; 6) to evaluate students fairly, consistent with policy; 7) to formulate acceptable teaching objectives; 8) to have an acceptable manner of conducting parent teacher conferences; and 9) to carry out required ministerial and quasi-administrative duties.

Teacher performance is determined by supervisory appraisal. The evaluation process must be fair; it must provide the teacher with a clear understanding of his performance problems and assist him in improving his performance. The Tenure Commission will closely scrutinize the procedures used to evaluate teachers to determine whether they are fair.

The author has developed the following tests[22] that school board members, supervisors, and teachers may wish to use in order to determine whether proper evaluation procedures have been employed and whether just cause exists for demoting or discharging a tenure teacher for incompetency. These tests have been derived from decisions of the courts and the Tenure Commission. A "no" answer to any of the questions indicates possible deficiencies in the evaluation process and may predict whether the discipline imposed will be sustained by the Tenure Commission. It should be understood that the guidelines set forth below are to be applied before charges are filed against the teacher.

TEST No. 1. Did the board of education specifically enunciate clear, valid, professional standards to be used to adjudge the teacher's fitness to teach?

The obligation of the local district to adopt standards was stated by the Court of Appeals:

> Specifically enunciated "professional standards" should be used to adjudge the teacher's fitness. These standards should be clear to teachers so that they may serve to both guide and judge them. Adjudications should be the product of on-going contact, observation, and published judgments by numerous persons of different backgrounds and expertise. Frequently, a teacher will be deemed lacking in some abilities and capable in other areas. In such a case, the judgement of his quality will involve a determination of priorities, of which disciplines are more important to the school than others. Such priorities should, too, be carefully enunciated. The definition of goals and objectives as well as a working dialogue will be products of an ongoing evolution and enunciation of standards.[23]

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[22] Following generally the test developed by Arbitrator Carroll R. Daugherty in *Grief Bros. Cooperage Corp.* (42 LA 55).

[23] Beebee v. Haslett Public Sch., 66 Mich. App. 718, 726, 239 N.W.2d 724, 729 (1976).

To establish incompetency, it must be shown that the standards by which the teacher is to be evaluated are specific, reasonable and not arbitrary; that he had knowledge of and understood the standards; and that he has been informed that his teaching does not meet the district's expectations.

It is recommended that the *Beebee* factors always be incorporated into the standards. Evaluation should be conducted for the purpose of improving the teacher's performance and the quality of instruction offered to pupils, based upon written criteria. Written standards for evaluating teachers should include those factors that determine professional competence and effectiveness. The standards should be reasonably related to the safe, orderly, efficient operation of the school and clearly state the performance the district might properly expect of the teacher. Teachers should be provided with a copy of the standards together with an opportunity to raise questions about any they do not understand.

Information concerning the evaluation criteria and procedures for evaluation should be provided to teachers when they start teaching in the district, at the beginning of each school year, and when changes are made in the criteria or procedures.

TEST No. 2. Did the evaluator(s) have sufficient training, experience, knowledge, and skill in evaluation?

The Commission has stated that the weight it "will assign to the evaluator's conclusions regarding the satisfactoriness of particular areas of performance will depend upon his or her skill in evaluating, training, experience and knowledge."[24]

A teacher may reasonably expect to have his teaching judged by a competent person who has an adequate background in evaluating classroom performance. School administrators may wish to develop a dossier that includes experiences and training in staff evaluation in anticipation of the time they will be called upon to establish their credentials as competent evaluators.

In some circumstances it may be acceptable to have more than one person observe and evaluate. A second evaluator may be necessary if open hostility or antagonism has existed between the teacher and the first evaluator.

TEST No. 3. Were there a sufficient number of properly conducted classroom observations?

The Tenure Commission stated that "we find that an evaluator's observations of acts, events, and occurences while he or she is in the classroom is worthy evidence. In the absence of factually discrediting evidence or other impeachment, the evaluator's observations will be afforded appropriate consideration."[25]

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[24] Wildfong v. Comstock Public Schs., TTC 74-26-R at 16.
[25] Id.

There is no magic number of observations, but if a teacher is to be properly judged, he should be observed a number of times. Observations should be open, without subterfuge, and with timely advance notice. They should take place with the full knowledge of the teacher. In *Chesher v. Coldwater Community Schools*,[26] the Commission held that conducting only two formal observations was insufficient and that it was improper to use information obtained from informal classroom vists.

It isn't necessary to observe every teacher the same number of times, and it is not harassment to observe a teacher who has been identified as having problems more often than other teachers. Sometimes supervisors will conduct a pre-observation conference with the teacher.

Occasionally parents will visit their child's classroom. In regard to the use of parental observations in the evaluation process, the Commission has stated:

> Parental complaints are a factor in determining competency, and parental observations may, in certain circumstances be afforded appropriate weight toward establishing reasonable and just cause. . . . However, such complaints must be carefully weighed to protect tenured teachers from a concerted effort by one or a small number of parents upset with a teacher's performance.[27]

TEST No. 4. Did the evaluator provide timely oral and/or written critique(s) of the teacher's classroom performance that offer constructive suggestions and recommendations for improvement together with suggested methods for implementing them?

In *Wildfong v. Comstock Public Schools*, the Commission held that "an evaluator's critique will be examined to determine whether suggestions or recommendations for improvement were offered and whether the suggestions were sufficiently valid and detailed to afford the teacher a means of correcting his or her deficiencies."[28]

The evaluation statement should be a factual, open, candid, and impartial description of what occurred in the classroom. The evaluation should refer to the enunciated professional standards and address the noted strengths and weaknesses. The critique should be detailed enough to afford the teacher a means of correcting his deficiencies. Where necessary, the critique should offer suggestions covering instructional techniques and methods for improving classroom control.[29]

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[26] TTC 73-56-R. In Cameron v. Algonac Schs., TTC 77-25, the Commission held that a "charge of parental complaints as constituting just and reasonable cause for discharge is insufficient on its own to justify. . . discharge." In Cameron, parental complaints in the form of requests that students not be placed in the teacher's classroom were found to be a reason for discharge.

[27] Id. at 8.

[28] TTC 74-26-R at 16; *accord*, Wujokowski v. Essexville-Hampton Public Schs., TTC 79-37.

[29] In Wolff v. Benton Harbor Schs., TTC 80-31 at 16, the Commission stated: "We have consis-

The evaluator should take into account circumstances that may be unusual, e.g., more than a normal number of disciplinary problem students or special education students, or recent transfer of the teacher to a position where the teacher has not had recent training or experience.

TEST No. 5. Did the evaluator meet with the teacher to explain the deficiencies noted in the written critique(s), and afford the teacher an opportunity to discuss the teacher's goals and methods, and allow for feedback from the teacher?

In *Chesher v. Coldwater Community Schools*, the Commission, in commenting on the principal's evaluation, stated:

> We note, however, that he failed to discuss with Appellant the problem areas be observed during these informal visits, nor did he offer suggestions as to how to improve or strengthen these areas. We believe such discussions and suggestions are mandatory to provide the affected teacher with an opportunity to improve. We believe the use of these formal observations without providing the teacher an opportunity to discuss them is improper. The administration has a duty to discuss with its teachers those problem areas it discovers and to provide the teachers with an opportunity to correct them. The failure to do so should not then be used by the administration as proof of a teacher's deficiency.[30]

Sometimes evaluators perceive deficiencies that can be readily explained if the teacher is given an opportunity to discuss the criticisms.

TEST No. 6. Has the district provided the teacher with assistance to aid in overcoming the deficiencies that have been noted by the evaluator?

Although a school district is not required to retrain a teacher, it should show that it has tried to help the teacher to overcome the problems he is having in the classroom. Assistance may be in the form of suggestions and recommendations provided by the supervisor, written materials such as pamphlets, books, and journal articles related to the observed deficiencies, inservice training and workshops, access to staff development personnel, and periodic feedback.[31]

TEST No. 7. Has the teacher been afforded a reasonable period of time to implement the supervisor's recommendations and improve in those areas the evaluator found to be deficient?

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tently held that a teacher experiencing difficulties in his/her classroom must be afforded an opportunity to improve."

[30] TTC 73-56-R at 5.

[31] Wildfong v. Comstock Pulbic Schs., TTC 74-26-R.

A teacher should be given enough time to incorporate the supervisor's recommendations and suggestions into his teaching methods. During the remediation period, the teacher's supervisor should continue with observations, providing feedback so that the teacher is well informed of his progress or lack of progress. It is important to note, however, that the the Court of Appeals has stated that the Tenure Act does not require a "controlling board to take affirmative steps to afford specialized training to a teacher who has failed to perform his or her professional duties."[32] The teacher should, after a reasonable period, bring about improvement in his teaching. If the teacher has failed to correct noted deficiencies despite specific recommendations and time to do so, incompetency is established.

TEST No. 8. Has the district applied its standards for classroom teaching effectiveness evenhandedly and without discrimination or harassment?

A teacher will sometimes assert that his supervisor has conducted a pattern of harassment in order to get rid of him. A finding of harassment must be based on more that mere conjecture or speculation. The Tenure Commission has adopted the policy that to prevail on a harassment defense, "the teacher must show that 1) the controlling board or its agent, 2) acted or engaged in conduct which was, 3) improper or unreasonable under the circumstances, 4) with the intent to interfere, and 5) which did interfere with the teacher's proper performance of his or her job."[33]

TEST No. 9. Has the district provided supporting evidence regarding the factual underpinnings for the conclusion that the teacher is incompetent?

In *Henderson v. Memphis Community Schools*,[34] the district had concluded that the teacher failed to cooperate with other teachers, that she lacked rapport with parents, that parents had complained about her, and that she had mishandled several situations with students. The district offered no evidence to support these conclusions, and as a result the teacher was reinstated with all salary lost.

TEST No. 10. Has the district provided a clear description of negative adverse effect upon the students, staff, or parents created by the teacher's classroom teaching ineffectiveness?

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[32] Benton Harbor Schs v. Wolff, 139 Mich. App. 148, 156, 361 N.W.2d 750, 756 (1984).

[33] Cooper v. Oak Park Schs., TTC 80-15 at 17-18.

[34] TTC 71-17-R, *aff'd*, Benton Harbor Public Schs. v. Wolff, Mich. App. , N.W.2d (1986).

The application of the *Beebee* requirement that an adverse effect on students and teachers must be shown is illustrated by the following:

> [T]he evidence indicates, and the school board found, that among other things, plaintiff had failed to comply with administrative regulations regarding the use of his classroom during the lunch hour, that contrary to board policy and administrative rule, he left his classroom unsupervised during times that classes were normally scheduled, that contrary to board policy and the master agreement, plaintiff often failed to turn in lesson plans as required, that contrary to an administrative directive, he permitted students to use a storage room, that he failed to follow procedures prescribed by board policy for dismissing students from class and that plaintiff had, on many occasions failed to schedule course-related activities for his classes and permitted students to engage in non-course-related activities during class time. The evidence also showed that the questioned activities affected the other students and teachers in the school.[35]

Adverse effect cannot be presumed for incompetency; it must be proven.The Tenure Commission will require good evidence of adverse effect. For example, if a teacher's classroom is noisy and disruptive because of a lack of discipline, it can adversely effect other staff members, but the effect must be demonstrated. Adverse effect is shown when 1) a teacher's lack of classroom control and poor instruction result in an inordinate number of transfer requests from the teacher's students and their parents; and, 2) students in the classroom are inattentive and engage in disruptive, unproductive, or unsafe behavior.

Character of Professional Services

It is clear that "character of professional services" relates to an individual's ability to teach. The Commission has adopted the following definition of the phrase "character of professional services":[36]

> A "professional" act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. . . . In determining whether a particular act is of a professional nature or a "professional service" we must look not to the title or character of the party performing the act, but to the act itself.[37]

Although all actions of a teacher are potentially related to his ability to teach, some offenses—unprofessional relations with students and insubordination—clearly fall outside this definition. Consequently, charges related to these offenses may be filed at any time. In this regard the Commission has stated:

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[35] Sutherby v. Gobles Bd. of Educ., 73 Mich. App. 506, 511-12, 252 N.W.2d 503, 506 (1977).

[36] Knopf v. Flint Bd. of Educ., TTC 78-41.

[37] Swassing v. Baum, 240 N.W.2d 24, 27 (1976).

> Though one may argue that all actions by a teacher relate to the teacher's ability to teach, the specific charges here—violation of school discipline standards and insubordination—are charges outside this all encompassing term. Should this Commission adopt such a broad definition as proposed by Appellant, it could effectively prevent a local board from taking justifiable action against a teacher for improper conduct constituting reasonable and just cause for demotion or dismissal. We do not believe the intent of the 60 day requirement was to bar such charges.[38]

It is the purpose of the following sections to describe the legal principles of unprofessional conduct, unprofessional relations with students, and insubordination. Charges for these offenses may be filed at any time.

Unprofessional Conduct

The United States Supreme Court has stated that "a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values."[39]

Responsible conduct upon the part of a teacher precludes relationships with students that contradict the values and moral attitudes the district is attempting to inculcate in children. Among the Tenure Commission's decisions are a number that deal with improper teacher/student relations, which may be classified as unprofessional conduct. Charges have included using vulgar language in the classroom,[40] expressing a desire to have sexual intercourse with a student,[41] attempting to establish an unprofessional romantic relationship with a student,[42] fondling a student (including his private parts),[43] propositioning a student for homosexual acts,[44] providing liquor and drugs to students,[45] having sexual intercourse with a student,[46] visiting a student at his residence where the teacher was seen embracing and kissing the student,[47] staying overnight at a student's apartment and traveling unaccompanied for several days with the student,[48] allowing a student who did not have a driver's license to operate the teacher's private automobile,[49] using sexually vulgar language in speaking with a child,[50] driving an automobile with students in dangerous weather after consuming alcoholic beverages,[51] consuming alcohol and allowing students to consume it in the teacher's presence,[52] bringing a gun to school,[53] involving students in the misappropriation of school property,[54] furnishing pills of an unknown content to students in violation of school rules concerning distribution of medication, encouraging a student to use marijuana, helping the student to obtain marijuana, and failing to report the student's use of marijuana.[55]

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[38] Jessup v. Sandusky Community Schs., TTC 77-32.

[39] Ambach v. Norwick, 441 U.S. 68, 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979).

[40] Stewart v. Lake City Area Schs., TTC 78-35.

[41] Knopf v. Flint Bd. of Educ., TTC 78-41.

[42] Sweeney v. Bloomfield Hills Sch. Dist., TTC 81-68; Reggio v. Anchor Bay Bd. of Educ., TTC 76-46; Tolliver v. Carrollton Bd. of Educ., TTC 76-37.

[43] Shimon v. Flint Bd. of Educ., TTC 82-2; Heemstra v. Bay City Sch. Dist., TTC 73-61-R.

[44] Mabry v. Wyoming Public Schs., TTC 79-30.The Commission reinstated Mabry because the school board hearing was not conducted properly. Since that ruling, Mabry has been charged with other acts of improper unprofessional conduct. Mabry v. Wyoming Schs., TTC 83-21.

[45] Barcheski v. Grand Rapids Public Schs., TTC 77-5-R; Dennis v. Flint Bd. of Educ., TTC 77-11.

[46] Barcheski v. Grand Rapids Public Schs., TTC 77-5-R. This allegation was not found by the school board to be established, so the issue was not considered by the Commission.

[47] Clark v. Ann v. Ann Arbor Public Schs., TTC 78-15, *aff'd*, Clark v. Ann Arbor Sch. Dist., 130 Mich. App. 681, 344 N.W.2d 48 (1983).

[48] Id.

The Commission has also considered unprofessional conduct of a teacher toward another staff member. The conduct included showing nude photographs of the staff member (the school librarian) to other teachers and students.[56]

The charges listed above do not relate to the teacher's ability to teach, nor to instructional competency, and hence do not involve the "character of professional services." However, if proven, all of the charges would constitute reasonable and just cause for demotion or discharge, because the teacher's actions display a disregard for the special responsibilities of an educator.Such conduct establishes a serious breach of the teacher's duties and obligations to the district and to students. Such actions are considered to be irresponsible, improper, and detrimental to students because they are inconsistent with the values the district is attempting to teach. In a New York State decision, cited with approval by the Tenure Commission,[57] the Court stated:

> A professional teacher entrusted with forming the moral and social values of our young people must accept the reality that he is held to a high or strict standard of conduct.At bar there is a serious charge made, with serious implications. Approximately two months after having a particular student under his guidance plaintiff is accused of going to bed with her. Such conduct might be susceptible to the presumption that the intimate relationship did not develop overnight. The incident conceivably could so upset the community as to undermine the confidence of students and parents of students who now seek plaintiff's guidance. This in turn could go the heart of plaintiff's ability to carry out his duties.[58]

There is, therefore, a rational connection between the board's interest in teaching proper values and acts by teachers that are destructive of those values. A board of education, in making its decision to discipline a teacher for unprofessional conduct, must always be aware that failure to take proper action and allowing the teacher to continue may be taken as approval of the conduct.

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[49] Id.

[50] Knopf v. Flint Bd. of Educ., TTC 78-41.

[51] Dennis v. Fling Bd. of Educ., TTC 77-11.

[52] Zarend v. Oscoda Area Schs., TTC 67-13.

[53] Streeter v. River Rouge Bd. of Educ., TTC 78-34.

[54] Creelman v. Grosse Pointe Public Schs., TTC 81-15; Beyer v. Bangor Public Schs., TTC 76-34; Cristan v. West Iron County Sch. Dist., TTC 73-63.

[55] Nolte v. Port Huron Area Schs.,Mich. App. , N.W.2d(1986).

[56] Wilson v. Muskegon Heights Sch. Dist., TTC 81-22.

[57] Clark v. Ann Arbor Public Schs., TTC 78-15.

[58] El Monte Sch. Dist. of Los Angles County, 35 Cal. App. 3d 490 (1973).

The question as to whether adverse effect must be shown in unprofessional student/teacher relationships was discussed in *Clark v. Ann Arbor School District*.[59] In that decision, the Commission held that Clark's improper relationship was presumed to have an adverse effect on students, teachers, and staff.

When a board of education is weighing charges against a teacher for sexual conduct or overtures for a sexual relationship with a student, it is not necessary to show "adverse effect" as such may be presumed.[60]

One question that has arisen is whether discharge is an appropriate remedy for a single lapse of professional judgement. In *Streeter v. Board of Education of River Rouge*,[61] the teacher was discharged for leaving the school building and returning with a pistol in response to threats received from a parent. The Commission upheld the discharge, but the Circuit Court found that the single act of poor judgment, weighed against twenty years of competent service, was insufficient to merit discharge. The court reinstated the teacher without backpay.

In *Dennis v. Flint Board of Education*,[62] the Commission approved the discharge of a teacher with twenty-four years of service because of one night's indiscretion. By the teacher's own admission she provided alcoholic beverages to students, became intoxicated, and then drove in dangerous weather in the company of students.

Discipline for the use of profanity is dependent on whether the profanity is used in an appropriate instructional context. In *Stewart v. Lake City Area Schools*[63] the teacher was charged with using profanity in the classroom. She admitted she did use such language, but claimed she had done so only in an effort to explain to students that it was improper for them to use profanity. In ruling on the matter, the Commission has adopted the rule that if the profanity constitutes part of the teaching process and has a valid educational purpose, its use may be permitted. However, exposure of students to vulgar language without educational purpose is prohibited. In *Stewart* the Commission found that the record did not clearly establish that the use of such language was not a valid educational purpose. Therefore the charge against the teacher was not established.

In *Shimon v. Flint Board of Education*, the teacher argued that discharge was too severe a penalty for unprofessional conduct because no apparent harm arose out of his conduct and the likelihood of repetition was slim. In rejecting the teacher's assertion, the Commission stated:

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[59] TTC 78-15; *aff'd*, Clark v. Ann Arbor Sch. Dist., 130 Mich. App. 681, 344 N.W.2d 48 (1983).

[60] Sweeney v. Bloomfield Sch. Dist., TTC 81-68; Clark v. Ann Arbor Public Schs., TTC 78-5.

[61] TTC 78-34.

[62] TTC 77-11

[63] TTC 78-35.

> [W]e find that neither the lack of proof of harm nor the alleged low probability of repetition warrants reduction. Appellant's offense is sexual contact with a student. Such conduct is presumed to have an adverse effect, it need not be shown. . . . Moreover, we place little credit in the notion that the likelihood of repetition is low. The record here shows that appellant has repeatedly resorted to this behavior.[64]

All human behavior is subject to interpretation. The most difficult charges of unprofessional conduct to interpret are those alleging sexual advances or sexual misconduct. Sexual misconduct between a teacher and student constitutes reasonable and just cause for discharge, but it is often difficult to establish the fact that it actually occurred. Questions arise as to whether the witnesses are credible and whether the alleged conduct has been exaggerated or misinterpreted, or whether it even happened. Two decisions illustrate this problem.

In *Heemstra v. School District of Bay City*,[65] the teacher was charged with taking "indecent liberties with D in that he hugged her, kissed her, and engaged in lewd conduct with that young student. On such occasions he did improperly and immorally feel of D's private parts." The student testified that she and the teacher had physical contact that included hugging, kissing, feeling of each other's genitals, and oral sex.

A majority of the Commission rejected the allegations for several reasons. The acts supposedly occurred in an unlocked room, easily accessible to students and staff and observable through windows. It was reasonable to assume the teacher would have selected a safer, more secluded place. The teacher had previously terminated counseling sessions with the student, which she took as rejection. In her early childhood she had often suffered rejection. The majority of the Commission believed her accusations of sexual conduct were an attempt to retaliate and punish the teacher.

In *Sweeney v. Bloomfield Hills School District*,[66] the Commission found that sending love notes to a student was improper conduct but that it could not be categorized as sexual misconduct or overtures for a sexual relationship with the student. Accordingly, the Commission held that adverse effect must be shown. Adverse effect was shown in that the student was uneasy about the relationship, the teacher's conduct placed the control and responsibility for the relationship on a fourteen-year-old student, and the damage to the normal teacher/student relationship created the potential for having a manipulative, if not coercive, effect on the student, and the grading process.

In *Wilson v. Muskegon Heights School District*, the Commission found that the showing of nude photographs of a fellow teacher, the school librarian, had an adverse effect. The Commission stated:

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[64] TTC 82-2 at 5.
[65] TTC 73-61-R
[66] TTC 81-68.

> Clearly, appellant's actions made the librarian the subject of her co-workers' derisive comments. In addition, the librarian testified that the showing of pictures to other staff members embarrassed her greatly. She became reclusive, avoiding other staff members as much as possible. She suffered depression which required counseling and medicine to treat. The librarian subsequently resigned and moved to another city. These incidents were factors in her decision to resign. Thus, we find that appellants's actions impaired the librarian's ability to relate to others effectively in the school setting. Moreover, we find that appellant's conduct had a harmful effect on other staff members as well as on the students.[67]

In *Reggio v. Anchor Bay Board of Education*[68] the Commission sustained the suspension without pay of a teacher who wrote love notes to a thirteen-year-old student. The teacher had read one of the notes to other seventh graders. The student was embarrassed and humiliated in front of her peers and was so disturbed she sought her counselor's help.

In *Tolliver v. Carrollton Board of Education*,[69] the teacher was charged with exhibiting unethical professional behavior with students.Four female students alleged that the teacher had engaged in conduct which they interpreted as a "sexual advance." One student alleged that the teacher purposely bumped into her, grabbed her by the arm, questioned her as to whether she liked him, asked her for a kiss, rubbed her neck and back, and rested his hand on her leg as she squatted by his desk to ask a question. The students interpreted these incidents as an attempt to establish an abnormal student/teacher relationship.

The Commission believed that there were underlying motivations and factors, including prior knowledge of rumors concerning the teacher's relationships with other female students, that predisposed and influenced them to misinterpret and exaggerate the teacher's conduct. The Commission also believed that the students' perceptions of the teacher's touching and comments to them were affected by the fact the he was black. The Commission found that other teachers in the district used touching as a means of communication and as an attention-keeping device. By touching, the appellant was only seeking to copy the behavour of other successful teachers; it was inappropriate to deny him the use of this teaching tool. The Commission found that the district's case lacked sufficient credibility for a finding of reasonable and just cause. Further, the Commission found that the teacher had not been given adequate guidance as to the proper way to remedy the problem.

A controlling board may enforce reasonable regulations regarding dress and appearance. A teacher has been charged with lack of neatness and decorum in appearance. However, the Commission refused to sustain the charge because of inadequate standards or definitions of proper dress and appearance.[70]

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[67] TTC 81-22 at 18.
[68] TTC 76-46.
[69] TTC 76-37.
[70] Beyers v. St. Ignace Sch. Dist., TTC 77-17.

Insubordination

Teachers may not disregard reasonable rules or directives which further the legitimate aims of the controlling board.[71] Good-faith compliance with the rules and directives of one's supervisor is fundamental to the effective operation of a school. A teacher has a duty to comply unless compliance endangers his physical or mental well-being.[72] The Commission and the courts have had occasion to define and apply charges of insubordination.

In *Davis v. Grand Rapids Board of Education* the Commission defined insubordination as "willful disobedience to a directive or policy by one fully understanding such directive or policy."[73] In *Tolliver v. Carrollton Board of Education*, the Commission stated: "[F]or a finding of insubordination the rule or directive must be reasonable and not arbitrarily applied."[74] and in *Sutherby v. Gobles Board of Education* it stated:

> We hold that a teacher who, after being warned, persists in violating the reasonable rules and regulations of a local controlling board, interfering with the proper operation and management of the school district, has engaged in conduct constituting just and reasonable cause for discharge regardless of the sufficiency of his teaching performance. . . . Reasonable and just cause for discharge is established by a controlling board when it has proven, by a preponderance of the evidence, that a teacher has been insubordinate, by having engaged in repeated willful violations of board or administrative rules and regulations.[75]

However, the requirement that the act of insubordination must result in more than a nominal dysfunction is another way of saying that "adverse effect" must be shown. It is not necessary to prove that insubordinate conduct creates adverse effect.Our Court of Appeals has stated:

> "[T]he questioned activities and the record concern a consistent pattern of violation of rules and regulations that clearly are within the powers of the school board and the administration. . . . Such a pattern of violations showing persistent insubordination to proper authority, can be presumed to have an adverse effect on the students, teachers and staff of a school."[76]

Regarding the need to show adverse effect for insubordination the Commission has stated:

> Finally, Appellant contends that the Board has failed to meet the requirements of *Beebee v. Haslett Public Schools*, 66 Mich App 718, 239 NW 2d 725 (1976. We

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[71] Knox-Brown v. Benton Harbor Area Schs., TTC 79-41.

[72] Mann v. Detroit Bd. of Educ., TTC 79-51; Visser v. AuGres Area Sch. Dist., TTC 80-18; Graham v. Trenton Public Schs., TTC 78-12; Piontkowski v. Oxford Area Community Schs., TTC 80-2; Branch v. Detroit Bd. of Educ., TTC 80-37.

[73] TTC 75-26 at 4.

[74] TTC 76-37 at 8.

[75] TTC 73-53-R at 11.

[76] Sutherby v. Gobles Bd. of Educ., 73 Mich. App 506, 512-13, 252 N.W.2d 503, (1977); *aff'd*, 132 Mich. App. 579, 348 N.W.2d 277 (1984).

> disagree. The *Beebee* case held that, in cases where charges involve the character of professional services, the controlling Board and the State Tenure Commission must find evidence that the charged teacher's activities have some adverse effect on the students and on other teachers and staff. The charges here are excessive absenteeism and insubordination based on continuous disregard for administrative regulations and directives. We find that the *Beebee* requirements do not reach these charges. We find *Sutherby v. Board of Education of the Gobles Public Schools*, 73 Mich App 506, 252 NW 2d 503 (1977), to be controlling. In *Sutherby*, supra, the Court of Appeals limited the requirements it had set out in *Beebee* to activities that could not be presumed to have an adverse effect on the students. But where the questioned activities concern violation of rules and regulations that are clearly within the authority of the school board and the administration, such as insubordination, a detrimental effect on the students, teachers, and staff could be presumed.[77]

To establish insubordination, the controlling board has the burden of showing that the policy, rule, or directive is reasonable and not arbitrary, that the person charged had knowledge of and understood the rule or directive that he is claimed to have disobeyed, that he has been fairly apprised that his conduct was unacceptable, and that he willfully disobeyed the policy, rule or directive.[78] In *Memphis Community Schools v. Henderson*, the Court said "that wilful or persistent disobedience with knowledge of the board's rules is required to constitute 'just cause' when charges of the aforementioned nature (persistent disobedience) are brought."[79]

If a teacher has been made aware of a problem and has refused to cooperate, his refusal is detrimental to the proper functioning of the administration of the school.[80]

The Commission will not order the discharge or demotion of a teacher if the rules and directives violated are unreasonable, arbitrarily applied, or result only in nominal dysfunction to the school system.[81] But this rule does not permit teachers to disregard reasonable rules or directives.[82]

Reasonable and just cause for demotion or discharge can be established by a showing of insubordination without regard for the individual's competencies as a classroom instructor.[83]

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[77] Pounder v. Harper Woods Public Schs., TTC 74-5-2 at 10.

[78] Luther v. Alpena Bd. of Educ., 62 Mich. App. 32, 233 N.W.2d 173 (1975); Piontkowwki v. Bd. of Educ., Oxford Area Community Schs., TTC 80-2; Willis v. Grand Rapids Public Schs., TTC 79-51; Tolliver v. Carrollton Bd. of Educ., TTC 76-37; Davis v. Grand Rapids Bd. of Educ., TTC 75-26; Sutherby v. Bd. of Educ., TTC 73-53-R.

[79] ___ Mich. App.___ , ___ N.W.2d___ (1986).

[80] Beebee v. Haslett Pub. Schs., (—after remand—) 406 Mich. 224, 234, 278 N.W.2d 37, 41 (1979).

[81] Mikkelsen v. Bd. of Educ., Ottawa Area Intermediate Schs., TTC 82-59; Piontkowski v. Bd. of Educ., Oxford Area Community Schools, (80-2).

[82] Branch v. Detroit Bd. of Educ., Region 2, TTC 80-37.

[83] Sutherby v. Bd. of Educ., Gobles Public Schs., TTC 73-53-R; *aff'd*, 132 Mich. App. 579, 348 N.W.2d 277 (1984).

Disciplinary action for insubordination may be invalidated if the district's policy or rule has been unevenly enforced.[84] The Commission has stated, however, that claims of disparate treatment are limited to those incidents which were shown to have been made known to the administration. It is rather difficult to investigate or punish undiscovered wrongdoing.[85]

When determining discipline for insubordination, a school board may consider evidence of conduct from prior years, and evidence for which the teacher has already been disciplined, to show a continuing course of conduct and prior warnings.[86] In addition, if subsequent misconduct is shown, already disciplined misconduct may be considered in weighing the discipline to impose.[87]

Insubordination charges have included refusal to accept and grade late papers and to surrender student records;[88] refusal to readmit a child previously excluded by the teacher in violation of board policy;[89] using improper physical force on a student in violation of directives or board policy;[90] failure to complete and submit a written curriculum for the teacher's classes as required;[91] leaving school early in spite of an explicit denial of the request;[92] failure to visit Advisory Council members as required;[93] permitting students to engage in non-course related activities (card-playing and chess) during class periods;[94] failure to follow administrative directives;[95] physically threatening an administrator;[96] physically striking an administrator;[97] failure to follow the recommendations and directives provided by supervisors concerning classroom problems;[98] failure to prepare proper educational plans for special education students;[99] failure to teach sex education, or seek to implement the accommodations to the teacher's religious beliefs offered by the board;[100] attempts to tape record meetings and conversations with administrators after having been enjoined previously by the court from secretly taping any conversations with school administrators, agents, or employees;[101] refusing to comply with the supervisor's rules by failing to administer certain tests as required by the administration;[102] knowingly misusing paid, personal-business leave time to work for another employer in violation of board policy;[103] refusal to attend inservice training programs and workshops;[104] failure to comply with the board's dress and appearance policy;[105] and misuse of or failure to disburse district funds.[106]

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[84] Van Vliet v. Lakeview Community Sch. Dist., TTC 76-36; Tolliver v. Carrollton Public. Schs., TTC 76-37.

[85] Harding v. Bedford Public Schs., TTC 82-47.

[86] Morgan v. Galesburg-Augusta Community Schs., TTC 85-11; Mikkelsen v. Ottawa Area Intermediate Schs., TTC 82-59; Wolff v. Benton Harbor Area Schs., TTC 80-13; Peters v. Dearborn Heights Sch. Dist. No. 7, TTC 78-20; Sutherby v. Gobles Public Schs., TTC 73-53.

[87] Private Decision, TTC 83-59; Mikkelsen v. Bd. of Educ. Ottawa Area Intermediate Schs., TTC 82-59; Duva v. Algonac Bd. of Educ., TTC 80-24; Mann v. Sch. Dist. of Detroit, TTC 79-58.

[88] Mann v. Detroit Bd. of Educ., TTC 79-58.

[89] Branch v. Detroit Bd. of Educ., Region 2, TTC 80-37.

[90] Private Case, TTC 83-65 and 83-85; Harding v. Bedford Public Schs., TTC 82-47-2;Trowt v. Beecher Sch. Dist., TTC 80-27; Willis v. Grand Rapids Public Schs., TTC 79-51; Peters v. Dearborn Heights Public Schs., TTC 78-28; Jessup v. Sandusky Community Schs., TTC 77-32; Van Vliet v. Lakeview Community Sch. Dist., TTC 76-36.

[91] Mikkelsen v. Ottawa Area Intermediate Sch. Dist., TTC 82-59.

[92] Id.

[93] Id.

[94] Sutherby v. Gobles Public Schs., TTC 73-53-R.

[95] Davis v. Grand Rapids Bd. of Educ., TTC 75-26-R.

[96] Id.

[97] Id.

[98] Knox-Brown v. Benton Harbor Area Schs., TTC 79-41.

[99] Beyers v. St. Ignace Sch. Dist., TTC 77-17.

[100] Id.

Charges of insubordination have also included absenteeism and tardiness.[107]

Use of Excessive Physical Force to Discipline Students

The Tenure Commission has had several opportunities to review the discipline of teachers charged with the use of improper physical force on students.[108] The charges usually comprise overreacting to student misbehavior by applying excessive and inappropriate physical force. The factors utilized by the Commission in determining reasonableness of the use of physical force were set forth in a private case:

> 1) the student's age, size, sex, physical and mental condition; 2) the nature of the pupil's offense and his/her apparent motive, 3) the influence of the pupil's misbehavior on other students, 4) whether the force is necessary and appropriate to compel obedience to proper order, and 5) whether the force used is disproportionate or degrading.[109]

In adopting these factors, the Commission rejected the standard proposed by the teacher that unreasonable force can be shown "only by proving that appellant acted maliciously or that his actions resulted in serious or permanent injury."[110]

The safety of students is of paramount importance to a school board, and appropriate action may be taken to protect the physical well-being of students. A local board can and should take appropriate action to remedy situations that endanger, shock, and frighten students. Moreover, the board is not required to wait until a serious injury has occured before it takes action.[111]

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[101] Creelman v. Grosse Pointe Public Schs., TTC 81-15.

[102] Mikkelsen v. Ottawa Area Intermediate Schs., TTC 82-59.

[103] Duva v. Algonac Bd. of Educ., TTC 80-24.

[104] Beyer v. St. Ignace Sch. Dist., TTC 77-17.

[105] Id.

[106] Jensen v. Ludington Area Sch. Dist., TTC 82-63.

[107] Knox-Brown v. Bd. of Educ., Benton Harbor, TTC 79-41; Graham v. Trenton Public Schs., TTC 78-12; Fry v. Romeo Community Schs., TTC 77-19; Cohen v. Oak Park Bd. of Educ., TTC 76-40; Hamilton v. Fitzgerald Sch. Dist., TTC 75-36; Pounder v. Harper Woods Public Schs., TTC 74-53.

[108] Private Case, TTC 83-65 and 83-85; Harding v. Bedford Public Schs., TTC 82-47-2;Trowt v. Beecher Sch. Dist., TTC 80-27; Willis v. Bd. of Educ., Grand Rapids Public Schs., TTC 79-51;Peters v. Dearborn Heights Public Schs., TTC 78-28; Jessup v. Sandusky Community Schs., TTC 77-32; Van Vliet v. Lakeview Community Sch. Dist., TTC 76-36.

[109] Private Case, TTC 83-65 and 83-85 at 20.

[110] Id.

[111] Harding v. Bedford Public Schs., TTC 82-47.

In *Willis v. Grand Rapids Public Schools*[112] the teacher was charged with violating a school board policy that permitted teachers to use reasonable physical force by teachers to maintain discipline. The alleged incidents cited by the district included spanking, shaking a student "so vigorously that his head snapped back and forth," slapping students, and pinching students in the face. The Commission found that these incidents demonstrated that the teacher exerted force as a penalty and not merely to maintain control. Her actions constituted "corporal punishment," which according to board policy could only be carried out by a building administrator and to be applied only to the buttocks.

Willis offered several defenses. First, she argued that the district's policy restricted a teacher's statutory prerogative to use reasonable force to maintain discipline. She alleged that the district's policy failed to give effect to legislative intent. The statute is:

> (1) A teacher or superintendent may use reasonable physical force necessary to take possession of a dangerous weapon carried by a pupil.
>
> (2) A teacher or superintendent may use reasonable physical force on the person of a pupil necessary for the purpose of maintaining proper discipline over pupils in attendance at school.
>
> (3) A teacher or superintendent shall not be liable in a civil action for the use of physical force on the person of a pupil for the purposes prescribed in this section, except in case of gross abuse and disregard for the health and safety of the pupil.[113]

The Commission could find no legislative history that helped to interpret this statute. It was concluded that the statute both recognizes a teacher's authority to use physical force to maintain discipline and virtually extinguishes a teacher's civil liability for the use of such force. The question, however, was whether the provision prohibits a school district from formulating rules that impede a teacher's authority to use physical force. In rejecting the contentions of Willis, the Commission stated:

> By enacting the statutory provision under consideration here, the legislature did not mandate the use of physical force. Further, the legislature has neither required nor forbade school districts to promulgate rules to give effect to its general pronouncement although, clearly, the legislature could have done so. Thus, we find that the conflict lies between the general authority of a controlling board to develop rules to manage the schools and control pupil conduct under MCLA 380.1300; MSA 15.411300, and the statutory provision upon which appellant relies. In *Harris v. Commonwealth Secretary of Education*, 372 A2d 953 (Pa Cmwlth 1977), a teacher challenged his discharge for violation of a local school district policy which prohibited teachers from administering corporal punishment. The teacher contended that the local policy had no effect because he had a right under a state statute to exert physical force in disciplining his pupils. Much like the Michigan statute, the Pennsylvania court found that the statute in question was permissive. As such, the court held that the district's duty to manage and

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[112] TTC 79-51 and 79-51-R.

[113] MCLA 380.1312, MSA 15.41312.

> control was paramount. Thus, the court reasoned that a local school district could validly determine that no teacher in its employ would be permitted to administer corporal punishment. We find this reasoning compelling. We therefore conclude that, even if appellee's policy restricts a teacher's use of physical force to maintain discipline, that fact standing alone, would not render the policy invalid.[114]

Willis also argued that other teachers had been accused of violating the district's physical force policies and had suffered only a few days' suspension without pay. The Commission found that the board did not enforce its physical force policy unevenly, because the Commission's ruling in *Van Vliet v. Lakeview Community School District*[115] does not require that each teacher who has violated a school district rule or policy must receive the same measure of discipline. *Van Vliet* requires that each alleged violation of a particular rule or policy that is made known to the district's administration be subjected to investigation. Second, where a violation is shown, the determination of the penalty to be imposed on the offending teacher must be based on a fair consideration of the relevant circumstances.

The record revealed that some teachers were involved in more incidents than was the appellant and that they were treated less harshly.The Commission also found that the administration had relied on Willis's history of having been disciplined for disobeying a directive to leave her class to attend a meeting with the principal. The Commission rejected the board's attempt to use prior incidents because Willis was charged for violating the corporal punishment policy and not for being an ungovernable employee; also, the prior infractions were long past and were substantially different from the current misconduct. Nor was there any indication that Willis's conduct was any more estreme than that of other teachers involved in similar incidents who received penalties less severe than discharge. Her penalty was reduced from discharge to suspension without pay for part of one semester.

Dress and Appearance

The Tenure Commission has held that a controlling board has the right to set out and enforce reasonable regulations regarding dress and hygiene.[116] This ruling is based on a Federal District Court decision where the Court held that "the denial of public employment because the employer considers the applicant's appearance inappropriate for the position in question, does not in and of itself represent a deprivation that is forbidden by the due process clause."[117] If the board has a dress and appearance policy, however, it must be enforced. A refusal to comply with such a policy is an act of insubordination.

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[114] Willis v. Grand Rapids Public Schs., TTC 79-51 at 6-7.

[115] TTC 76-36.

[116] Beyer v. Bd. of Educ., St. Ignace, TTC 77-19.

[117] Miller v. Sch. Dist. No. 167, Cook County Illinois, 495 F2d 658, 668 (1974) cited in Beyer v. Bd. of Educ., TTC 77-17 at 13.

Absenteeism and Tardiness as Insubordination

Absenteeism without medical excuse is an act of insubordination and sufficient cause for discharge.[118] A teacher can be dismissed for tardiness that is continued or repeated in disregard of warnings to cease such conduct.[119] The case of *Cohen v. Oak Park Board of Education*[120] depicts the Commission's and the Court's disposition toward absenteeism as insubordination. In *Cohen* the teacher was absent seventy-four full days and three partial days. Thirty-three of these seventy-seven absences were not verified for medical reasons. On two days when he did not report for work, the teacher possessed a doctor's statement that he could return to work. On the unverified days Cohen often engaged in other activities that were found to be as strenuous and demanding as teaching. Once he went to Washington, D.C., on personal business without obtaining administrative approval to use personal leave. The Commission found that the pattern of absences showed a persistent insubordination to proper authority and had an adverse effect on the students, teachers, and staff of the school. Adverse effect was shown by the fact that his students had to endure thirteen substitute teachers. In upholding the discharge, the Commission stated that "[a] controlling board, as with any employer, has the right to have its employees on the job when medically able to work, subject, of course, to various exigencies. Appellant did not, as evidenced by his behavior, adhere to this simple maxim of the employer-employee relationship."[121]

In order to enforce a claim of insubordination based on absenteeism, the administration must inform the teacher that his absences are excessive and of concern for the school district.[122] In *Graham v. Trenton Public Schools*,[123] the teacher was charged with absenteeism because she did not report on fifteen days of fifty-one school days, a 30 per cent absence rate. The teacher testified that she was never informed that her absences were excessive or a source of concern for the school district. Because she had received neither prior warnings nor an opportunity to rectify the situation, the Commission ruled that the absenteeism charge could not be sustained.

A board must clearly establish absenteeism. In *Knox-Brown v. Benton Harbor Area Schools*,[124] the teacher was absent twenty days. Each absence was due to verified medical reasons or for deaths in family. Absences for the latter were permitted under the provisions of the collective bargaining agreement. The Commission refused to hold that the charge of excessive absenteeism had been established.

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[118] Pounder v. Harper Woods Public Schs., TTC 74-52.

[119] Fry v. Romeo Community Schs., TTC 77-19.

[120] TTC 76-40 and 76-40-2.

[121] TTC 76-40-2 at 7.

[122] Hamilton v. Fitzgerald Sch. Dist., TTC 75-36; Cohen v. Oak Park Sch. Dist., TTC 74-40.

[123] TTC 78-12.

[124] TTC 79-41.

In *Pounder v. Harper Woods Public Schools*,[125] the Commission sustained the discharge of a teacher who was absent for twenty-two consecutive days and failed to report for work upon written request by certified mail.

Suspension

A board of education has the authority to suspend a teacher from active performance of duty until his future status has been decided. When a teacher is seriously disrupting the educational process by his misconduct, the school board is justified in suspending him immediately, as long as the board provides a hearing as soon as possible and before discharging him without pay. A hearing is not required before suspension, but the tenured teacher's salary continues during the suspension period and stops only when the controlling board decides to release the teacher[126] or when the teacher resigns. The purpose of this requirement is to protect the teacher from loss of pay and financial hardship as the result of the bringing of frivolous charges.[127] A suspension of a tenured teacher without pay is deemed to be a demotion, which demands a full due-process hearing.

Should the teacher appeal the board's discharge decision and the board be ordered to reinstate him, the board might be required to pay him for the entire period in which he did not teach.[128] If the board's attempt to discharge a tenured teacher is sustained on appeal, the board would be obligated to pay the teacher only for that period of the suspension that occurred prior to the board's hearing.

Demotion

Definition and Application

The Tenure Act defines *demote* as "to reduce compensation or to transfer to a position carrying a lower salary."[129] The Michigan Supreme Court has construed "demotion" to involve money rather than of a prestige.[130]

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[125] TTC 74-52.

[126] MCLA 38.103, MSA 15.2003."[T]he controlling board may suspend the accused teacher from active performance of duty until a decision is rendered by the controlling board, but the teacher's salary shall continue during such suspension." A teacher is entitled to be paid wages from date of suspension to date of termination of employment.Caddell v. Ecorse Bd. of Educ., 17 Mich. App. 632, 170 N.W.2d 277 (1968).

[127] Mullally v. Trenton Bd. of Educ., 13 Mich. App. 464, 164 N.W.2d 742 (1968).

[128] MCLA 38.103, MSA 15.2003.The "mitigation doctrine" is applied in determining the amount to be paid the teacher.Wages a suspended teacher actually earns or could have earned are deducted from the suspended teacher's salary in arriving at the net or actual amount of salary lost. Shiffer v. Gibraltar Sch., 393 Mich. 190, 224 N.W.2d 255 (1974).

[129] MCLA 38.74, MSA 15.1974.

[130] Dodge v. Saginaw Bd. of Educ., 384 Mich. 346, 183 N.W.2d 793 (1971); Street v. Ferndale Bd. of Educ., 361 Mich. 82, 104 N.W.2d 748 (1961).

The demotion of a tenured teacher must follow the same procedures as required for discharge;[131] if those procedures are not followed, the teacher is entitled to the remedies provided by the Tenure Act. For example In *Smith v. Ecorse Public Schools*,[132] the school board suspended a teacher for seven days without pay and without affording him a hearing. The Tenure Commission held that suspension without pay constitutes a demotion, and ordered reinstatement and payment of all salary lost.

Transfer as Demotion

An important issue is whether the transfer of a tenured teacher or administrator to a position requiring a shorter period of work is a demotion under the Act.The Commission's decisions are not consistent on this matter. In *Purdy v. Jackson Public Schools*,[133] a school principal was transferred from a junior high school to an elementary school. His new position required fewer weeks of service. In holding that no demotion had occurred, the Commission stated:

> While it is true that the Appellant would receive less total pay at the end of a given fiscal or calendar year, such salary decrease would be directly related to service rendered. The junior high school and the elementary principalships apparently do not require the same number of weeks of employment. It is the position of the Commission that the Appellant was not demoted when he was continued as an administrator in a position requiring fewer work weeks in a given year.[134]

Without refering to its decision in *Purdy*, the Commission held in another case that transfer to a position requiring less service, and therefore less salary, was tantamount to a suspension without pay. In this matter, a middle school counselor was transferred to a classroom teaching position with fewer work days and a correspondingly lower salary:

> This Commission has long recognized that a suspension without pay constitutes a demotion. See *Smith v. Ecorse Public Schools* (72-24). The logic supporting this holding is clear and is applicable here. A teacher suspended without pay is ready, willing and able to perform. The right to perform, and thus to receive compensation, is barred by the board's action removing him/her from the classroom. Likewise, a transfer to a position requiring less service diminishes the employee's right to render services and to receive compensation. In either situation, the controlling board's action places the teacher in a position whereby his/her compensation is reduced. We hold, therefore, that a transfer to a position carrying a lower salary because the amount of service required is reduced is a demotion with the meaning of the Act.[135]

The author is unable to reconcile these divergent decisions.

In a recent decision the Commission held that an involuntary transfer to a different assignment at the same salary, that required a longer non-reimbursable commute from the teacher's home to her job was not a demotion, because the district did not have a policy of reimbursing employees for such mileage.[136] The Commission also declined to find that a demotion had occurred when a teacher was "bumped" from her position as counselor into a classroom teaching position at no reduction in pay.[137]

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[131] MCLA 38.101, MSA 15.2001.

[132] TTC 72-24.

[133] TTC 75-31.

[134] Id. at 3.

[135] Clark v. Swartz Creek Bd. of Educ., TTC 83-80 at 3.

Use of Demotion as Corrective Discipline

Demotion as a disciplinary measure has been exercised a few times by local boards. From an analysis of the decisions, it appears that a short-term suspension without pay may be used as discipline when the teacher's misconduct is relatively minor and can be narrowed to a single incident. Such discipline has been imposed for the following infractions: misuse of sick days;[138] excessive tardiness;[139] writing "love notes" to a thirteen-year old student;[140] misusing paid personal-business leave time to work for another employer;[141] using excessive force in dealing with a student;[142] and refusing to accept students' late papers.[143]

Demotion by Withholding a Scheduled Salary Increase

The single salary schedule is commonly used by school districts in Michigan. It provides for a base salary for beginning teachers and yearly increases awarded for experience for up to about ten or twelve years. The question has arisen as to whether a school board's refusal to grant an annual salary increase as a penalty for deficient teaching constitutes a demotion under the Tenure Act. Decisions of the Commission have never defined demotion in terms of a teacher's reasonable expectation of a full yearly increment.

In *LeGalley v. Bronson Community Schools*[144] the Tenure Commission determined that the controlling board's decision to withhold a salary increase constituted an attempt to force LeGalley from his position and was constructive discharge. In rejecting the Commission's ruling, the Court of Appeals determined that proofs of constructive discharge were clearly inadequate and that no demotion occurred when the salary increase was not awarded. The Court stated:

> We realize that the teachers' tenure act, as we interpret it, provides unorganized teachers and school administrators with precious little protection from arbitrary compensation decisions by school boards. When the tenure act was first adopted, the Legislature

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[136] Owens v. Ingham Intermediate Sch. Dist., TTC 83-3.
[137] Stone v. Fraser Public Schs., TTC 84-38.
[138] Huber v. Bd. of Educ., TTC 83-33.
[139] Fry v. Romeo Bd of Educ., TTC 77-19.
[140] Reggio v. Anchor Bay Bd. of Educ., TTC 74-46.
[141] Duva v. Algonac Bd. of Educ., TTC 80-24.
[142] Trowt v. Beecher Sch. Dist., TTC 80-27.
[143] Mann v. Detroit Bd. of Educ., TTC 79-58.
[144] TTC 79-52.

> may not have anticipated that the denial of a salary increase may have the impact of a salary decrease in a time of rampant inflation. We recognize that the tenure commission's use of the "subterfuge test" in this case represented an honest effort to strike a balance between a school board's autonomy and freedom to contract and the goals advanced by the teachers' tenure act in general. Our reading of the act, however, convinces us that the Legislature has not invested the commission with the authority to strike this particular balance and has not given the commission any general power to advance the goals of the act. The task of providing teachers and administrators with protection from arbitrary compensation decisions is one for the Legislature alone.[145]

It has been held that if an adopted salary schedule is totally silent about deviations, the withholding of an increase provided for in the schedule constitutes a reduction in normal compensation and is a demotion. Thus, when a case where teacher's experience increment was withheld although the salary schedule provided for no deviations, demotion occurred.[146]

However, the Commission has adopted a policy that if the terms of a collective bargaining agreement allow deviations from the increases called for in the salary schedule, retaining a deficient teacher at one level is not a reduction in compensation, therefore it is not a demotion.[147] In *Cutshall v. Zeeland Public Schools*, the school board and the teachers' union had entered into a negotiated agreement that provided in part for "financial retention" or withholding of an increment for unsatisfactory or deficient performance. A teacher who was retained at the same step on the salary schedule as the previous year while teachers with similar experience were granted increments claimed that the board's action constituted a demotion under the Tenure Act. The Commission held that the board had reserved the right, in the master agreement, to withhold normal salary increments and that such action did not constitute a demotion. The Commission has followed the same policy subsequently.[148] In keeping with this view the Commission has refused to rule on matters which, even though they involved a reduction in pay, were actually labor disputes or differences of opinion in contract interpretation.[149]

It is a common practice during negotiations to change the structure of teachers' salary schedules. Often this results in larger salary increases for some teachers and smaller ones for others. The question has been raised as to whether this differential treatment constitutes a demotion for those teachers receiving the smaller increases. It has been held that a demotion did not occur when certain classes of teachers in the district received smaller salary increases than others due to a negotiated, redesigned salary schedule.[150]

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[145] LeGalley v. Bronson Community Schs., 127 Mich. App. 482, 487-88, 339 N.W.2d 223, 226 (1983).

[146] Matthews v. Sch. Dist. of Pontiac, TTC 64-5.

[147] Cutshall v. Zeeland Public Schs., TTC 73-42.

[148] Niemi v. Kearsley Public Schs., TTC 73-52.

[149] Kuntz v. Owendale-Gagetown Schs., TTC 77-24; Stewart v. Pewamo-Westphalia Community Schs., TTC 76-55; Hamilton v. Fitzgerald Sch. Dist., TTC 75-36.

[150] Hanson v. Sch. Dist. of Benton Harbor, TTC 71-42.

The Commission has also held that placing a teacher on a schedule that resulted in less of a raise than would have resulted from payment under the previous method did not constitute a demotion. Since there was no guarantee to any one employee regarding his rate of salary increase in the ensuing years after he was employed, the board of education was under no obligation to maintain a differential once a single salary schedule had been negotiated for all employees.

The Commission refused to find that a demotion had occurred in the following case. A controlling board placed a teacher at the eighth-and-one-half step of a salary schedule instead of at the ninth step after the board discovered that the teacher had initially been hired midyear and been incorrectly placed on the first rather than the half step. Since the collective bargaining agreement contained a provision requiring each teacher to be placed at a step that corresponded to his experience, the matter was one of contract interpretation and not of demotion.[151]

Withholding Compensation or Fringe Benefits When Service Is Not Rendered

Questions have arisen as to whether denying compensation or a negotiated fringe benefit when services are not rendered constitutes a demotion under the Tenure Act.[152]

A denial of compensation when services are not rendered is not a demotion. For example, when a teacher called in sick and then attended a meeting of the teacher's association on the afternoon of the absence, the teacher's pay was withheld.[153] The Commission held that the denial of pay for misuse of sick leave did not constitute a demotion, stating: "[T]here is no requirement under the Tenure Act that a school district is obligated to pay an employee if service is not rendered."[154]

In another case, a pregnant teacher informed her principal that her physician had instructed her not to teach.Her request to use accumulated sick leave was denied.[155] The Commission held that there was no demotion under the Tenure Act even though there was a reduction in salary, because there had been a corresponding reduction in the amount of services rendered. The Commission stated: "A teacher who earns tenure obtains statutory procedural rights against discharge or demotion. These procedural protections provide no rights to attack benefits granted or denied by a contract."[156]

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[151] Farrimond v. Bd. of Educ., East Jordan, TTC 78-3, *aff'd*, 138 Mich. App. 51, 359 N.W.2d 245 (1984).

[152] Kuntz v. Owendale-Gagetown Bd. of Educ., TTC 77-24; Stewart v. Pewamo-Westphalia Community Schs., TTC 76-55.

[153] Stewart v. Pewamo-Westphalia Community Schs., TTC 76-55.

[154] Id. at 2.The Commission noted that that a master agreement could define absences and provide remedial procedures.

[155] Kuntz v. Owendale-Gagetown Bd. of Educ. TTC 77-24.

[156] Id. at 4.

May a controlling board withhold from a teacher's salary the unemployment compensation the teacher received during the summer months, if the board believes the teacher was not entitled to the compensation? In a case where a board had done this, the Commission held in favor of the teacher finding that the board had notice of the teacher's application for unemployment benefits and of the determination of the Michigan Employment Security Commission (MESC) of her eligibility. The board did not appeal that determination. Holding that the decision of the MESC is final and conclusive and that the board acted to withhold the money from her salary without notice, hearing, or determination of just and reasonable cause as required by the Act, the board committed an error mandating reembursement.[157]

A demotion does not occur when a teacher is removed from an extra-duty extra-pay position because such assignments are not within the Commission's jurisdiction.[158]

Granting a teacher a six-month leave of absence without a hearing when the teacher requested only six weeks, was a demotion.[159]

Missassignment

A school board was found to have demoted a teacher who had been laid-off when it employed her as a day-to-day substitute for an assignment what was actually of permanent status. The Board's failure to give the teacher full pay for her assignment was held to be a demotion.[160]

Demotion of Administrators

Several cases have come before the Tenure Commission and the courts in which the issue of demotion of administrators has been raised.[161] (For an extensive discussion of tenure rights of administrators see Chapter IV). The Tenure Commission lacks jurisdiction to hear demotion issues of administrators who do not have tenure in position.[162] In an early case,[163] the Michigan Supreme Court held that the removal of a principal, who had been denied administrative tenure, to the position of a visiting classroom teacher before expiration of his contract and at no reduction in salary did not constitute a demotion. The administrator argued that his reassignment was a demotion even though he was continued at the same pay, because the position of principal ranks higher professionally than visiting teacher. In rejecting plaintiff's assertion, the Court stated: "it is clear from the definition in the Act that the demotion against which it sought to protect teachers, as such, was of monetary rather than a prestige character."[164]

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[157] Private Case, TTC 83-33.

[158] Even v. Bd. of Educ., TTC 81-60; Salvadore v. St. Joseph Public Schs., TTC 75-25.

[159] Hambouz v. Brandywine Public Schs., TTC 77-46.

[160] Master v. Hamtramck Bd. of Educ., TTC 77-20. *Accord—: Goodrich v. Mt. Morris Consolidated Schs., TTC 83-5. In Goodrich* a laid-off teacher was recalled as a substitute teacher but he assumed full responsibility for the classroom. Note: However, the "full responsibility test" has subsequently been rejected. Weidman v. Brandon Bd. of Educ., 143 Mich. App. 207 371 N.W.2d 910 (1985).

[161] Bode v. Roseville Sch. Dist., 405 Mich. 517, 275 N.W.2d 472 (1979); Street v. Ferndale Bd. of Educ., 361 Mich. 82, 104 N.W.2d 748 (1961); LeGally v. Bronson Community Schs., 127 Mich. App. 482, 339 N.W.2d 223 (1983); Goodwin v. Kalamazoo Sch. Dist., 82 Mich. App 559, 267 N.W.2d 142 (1978; Grostick v. Kaleva-Norman-Dickson Board of Education, TTC 83-78; LeGalley v. Bronson Community Schs., TTC 79-52; Gondner v. Fruitport Community Schs., TTC 77-4; Purdy v. Jackson Public Schs., TTC 75-3; Goodwin v. Kalamazoo Sch. Dist., TTC 74-6 and TTC 75-35; Kestner v. Oak Park Sch. Dist., TTC 73-65; Bode v. Roseville Sch. Dist., TTC 72-45; Rossman v. Plymouth Community Sch., TTC 72-1; Alogdelis v. Ferndale Sch. Dist., 70-33; Walters v. Garden City Bd. of Educ., TTC 69-2; McCullough v. Willow Run Public Schs., TTC 68-20.

There is one case of record where an administrator who held tenure in his position as an administrator was demoted to the position and salary of a classroom teacher after a local hearing before the board of education. Based on extensive findings of fact, the Commission reinstated the administrator to his position as elementary principal.[165]

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[162] Kelly v. Gobles Bd. of Educ., TTC 81-54; Webb v. Sch. Dist., East Detroit, TTC 80-17.

[163] Street v. Ferndale Bd. of Educ., 361 Mich. 82, 104 N.W.2d 748 (1961).

[164] Id at 88, 104 N.W.2d at 752.

[165] Grostick v. Kaleva-Norman-Dickson Bd. of Educ., TTC 83-78.

CHAPTER VIII

Discontinuing Service

Teachers sometimes voluntarily discontinue their services with a school district by freely offering a resignation which is accepted, or by simply abandoning their positions. Occasionally teachers allege that they have been coerced into resigning. These issues have generated a substantial amount of litigation, which is discussed in this chapter.

Voluntary Resignation

The Michigan Teacher's Tenure Act provides:

> No teacher on continuing tenure shall discontinue his services with any controlling board except by mutual consent, without giving a written notice to said controlling board at least 60 days before September first of the ensuing school year.Any teacher discontinuing his services in any other manner than as provided in this section shall forfeit his rights to continuing tenure previously acquired under the act.[1]

This statutory provision refers to teachers who are on tenure but have not yet signed a contract to teach for the ensuing school year.(Such a teacher may also resign within sixty days with the board's assent.)[2] The "discontinuance of services" must be in the nature of termination of employment, with an intention to sever the employer/employee relationship.[3]

The legislature's intent in adopting this statute was described by the Court of Appeals in *Rumph v. Wayne Community School District*.[4]

> This section of the statute is clearly designed to prevent teachers from departing a school district immediately before school commences and thus leaving the school board without a sufficient number of teachers, or time to replace them. In addition, the penalty for a teacher's discontinuance in a manner inconsistent with the act is the loss of "—rights to continuing tenure previously acquired under the act."[5]

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[1] MCLA 38.111, MSA 15.2011.

[2] 1939-40, p. 514 OAG No. (unnumbered opinion) (June 14, 1940).

[3] 1969-70, p. 150 OAG No. 4704 (June 24, 1970).

[4] 31 Mich. App. 555, 188 N.W.2d 71 (1971).

[5] Id. at 561, 188 N.W.2d at 74.

The rights, which are lost under the statute cited above, are those rights acquired by a teacher under continuing tenure, and they are lost only if the teacher unilaterally terminates employment without giving the required sixty-day notice to the school board.

Resignation and Preserving Tenure

A tenured teacher not under individual written contract for the subsequent school year who wishes to resign can preserve his tenure by giving appropriate notice of resignation at least sixty days before September 1 of the ensuing school year. School board concurrence is not required.

A teacher may resign within the sixty days, provided the board consents, and preserve his tenure.

The phrase "preserve his tenure" means that the teacher who resigns in accordance with the law as described above may not be required to serve a two-year probationary period in another district. If he has preserved his tenure through appropriate timely notice to the board of education or mutual consent, he may be placed on immediate tenure if employed by another board or be required to serve no more than a one-year probationary period. If he has not preserved his tenure through appropriate action, he would be required to serve a two-year probationary period before acquiring tenure in another Michigan district.

If the tenured teacher is under contract for the next school year, he cannot take unilateral action to resign merely by giving notice sixty days before September 1. He must honor the contract unless the board agrees to release him. After a teacher and the controlling board execute a contract, neither the board nor the teacher can fail to observe its terms except by mutual consent.

If a tenured teacher submits a resignation after the sixtieth day prior to September 1 has passed, the board ought to decide whether it wishes to consent to the resignation or whether it wishes to invoke MCLA 38.111, MSA 15.2011. In *Stevens v. DeWitt Public Schools*,[6] four teachers submitted resignations during the month of August.The board adopted the following resolution on August 9.

> Mr. Moody made the motion that all four resignations be accepted by the Board and invoke Article V. Section 38.111 of the Michigan State School Code. Mr. Decatur seconded this motion. Ayes - 6, Nays - 0. Motion carried.[7]

The Commission ruled that had the board intended to consent to the resignations, it would have stated only "that all four resignations be accepted by the Board." However, when the board added the final phrase, "invoke Article V, Section 38.111 of the Michigan State School Code." the Commission held that it was clear the board intended to invoke the punitive section of MCLA 38.111 which results in the forfeiture of rights of continuing tenure. The Commission rejected the argument that the board should have taken no action on the resignations to affectuate the tenure forfeiture provisions. Such an inaction, the Commission held, would result in chaos. It would place the teacher in limbo, not knowing whether the board's action was a consent of the resignation or revocation of tenure.

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[6] TTC 77-35.

[7] Id. at 2.

The Commission recommended that if resignations are submitted after the sixtieth day prior to September 1, the controlling board should receive the letters and (1) move to invoke the forfeiture of continuous tenure, or (2) move not to invoke the punitive measure of MCLA 38.111, MSA 15.2011, thus preserving continuous tenure for those teachers seeking to resign.

Meeting of Minds Crucial

A teacher's offer of resignation must be specific. Hints or suggestions of a resignation, even if made by counsel, cannot be relied on by the school board; nor are they binding on the teacher. In *Lawson v. Wayne Community School District*,[8] the board of education argued that the teacher had indicated she would resign due to the atmosphere of animosity engendered between the teacher and board. The only documented suggestion of a resignation was made by the teacher's attorney in closing arguments before the Tenure Commission. He stated: "I shall advise my client that it would be fool-hardy for her to go back to teach there after what has happened. And I shall advise her, I will expect she will follow my advise [sic], she will resign from that school system after she has been reinstated and financially made whole."[9]

The Court held that the above statement could not bind the parties, since it was only the attorney's opinion and conveyed an intention to advise his client to resign. The record was insufficient to find a meeting of the minds as to the issue of resignation.

In *Wright v. Port Huron School District*,[10] the facts were sufficient to uphold a teacher's resignation and constitute a finding of the required "meeting of the minds." The Court determined the teacher and superintendent had agreed at a conference "to leave things the way they were at the time." It was determined that this meant that Wright would not be teaching. Wright was found to have resigned by mutual consent. The Tenure Commission had reached the same conclusion.[11]

In *Gleason v. Carney-Nadeau Public Schools*,[12] the Commission held that a verbal resignation unanimously accepted by the board of education was "entirely without merit." The resignation was allegedly proffered during a review of

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[8] 63 Mich. App. 57, 233 N.W.2d 713 (1975).

[9] Id. at 63, 233 N.W.2d at 715 (quoting Lawson v. Wayne Comm. Sch. Dist., TTC 69-15). Lawson was later discharged on the original charges.Lawson v. Wayne Comm. Sch. Dist., TTC 76-4.

[10] 13 Mich. App. 1, 163 N.W.2d 673 (1968).

[11] TTC 66-2.

[12] TTC 83-4.

Gleason's teaching performance with his principal and superintendent. Gleason tore up his copy of the written evaluation, stated, "That's it, I'm all done," and left the building. He did not return to teach his afternoon classes and called in ill for the entire following week. The Tenure Commission held that the teacher's statement "That's it, I'm all done" required an inordinately broad interpretation to constitute a resignation. Also, the fact that the teacher called in ill the following week was indicative of his belief that he had not resigned or abandoned his position.

In *Rzepka v. South Redford School District*,[13] the following resignation statement was submitted and accepted by the board:

> [I]t is my express purpose and intent to resign from my position as Superintendent of schools, effective July 1, 1976, and from any and all other positions which I have held in the School District before becoming Superintendent.

Even though Rzepka attempted to deny the resignation, the Commission held that it operated to terminate all employment rights and to voluntarily relinquish tenure rights he had acquired with the district up to the effective resignation date.

Proper Procedures for Acceptance of Resignation

At issue in several cases was the question of whether a school administrator can accept a teacher's resignation and bind the parties, or whether board action is required in every instance. This controversy probably arose over whether acceptance procedures could be different in the situation where a teacher resigned more than sixty days before September 1 and a situation where a teacher resigned less than sixty days before September 1.

In an early decision, the Commission held that a resignation offered more than sixty days prior to September 1 may be accepted immediately by the superintendent without formal acceptance by the board, the board's acceptance being a mere ministerial act. In *Morgan v. Gibraltar School District*,[14] the teacher was not under contract and he submitted his resignation more than sixty days before September 1, but he attempted to withdraw it. Morgan argued that the letter of withdrawal, which was submitted before the board had an opportunity to act on the resignation canceled the letter of resignation. The Commission, however, concluded that "formal resignation on the part of the controlling board was not a necessary legal step."[15] The Commission held that the letter of resignation is immediately effective if the tenured teacher is not under an existing contract for services, provided the letter is submitted more than sixty days before September 1, as required by MCLA 38.111, MSA 15.2011. The mutual consent factor only comes into play within the sixty-day period before September 1.

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[13] TTC 83-4.
[14] TTC 67-11.
[15] Id. at 2.

The Commission's rational for its policy announced in *Morgan* was stated in a later decision:

> The central thrust of the Morgan decision is that a resignation, once written, gives the board an immediate course of action: to seek a replacement for the teacher who has resigned.It could then be concluded that once a board has acted in good faith, and wholly or in part committed the "vacated" position, the letter of resignation precludes any rescinding of such action.[16]

The Commission's decision in *Morgan* may have led to some confusion when the Commission was confronted with resignation issues involving teachers who attempted to resign less than sixty days prior to September 1. In *Snyder v. Warren Consolidated Schools*, the teacher submitted a letter of resignation, to be given immediate effect, on February 20. Shortly thereafter he attempted to withdraw it. The board of education then acted to accept the resignation. In upholding the board, the Commission stated:

> [A] resignation once offered may be accepted immediately by the superintendent of schools. Acceptance of the resignation by the board of education is not required under the law and is a ministerial act.[17]

Snyder appealed to the circuit court,[18] and the Commission's decision was reversed on grounds that Snyder had revoked his offer to resign prior to its acceptance. (Snyder had tendered his resignation on February 20, 1974, and withdrawn it on February 21. Two days later, the associate superintendent accepted the resignation by letter and on February 27, the board formally accepted the resignation.)

The Circuit Court stated:

> The mere fact that the offer-acceptance purports to be effective immediately, or even that the superintendent has, by receiving it also accepted it, is not controlling.[19]

A recent decision of the Commission[20] shows that its policy is that:

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[16] Clawson v. Clawson Sch. Dist., TTC 71-18 at 1. Without rejecting its policy as first stated in *Morgan*, the Commission ruled in *Clawson* that the teacher's resignation was not final because she had acted to reverse her action almost simultaneously with profferring her resignation.

[17] TTC 74-17 at 2. The *Snyder* resignation can be distinguished from that in *Morgan*. Morgan was not under contract for the next school year and he resigned prior to sixty days before September 1. Snyder attempted to resign during the school year while under contract.

[18] Snyder v. Warren Consol. Schs, No. 75-17333, Circuit Court, Ingham County (November 6, 1975). The court held that Snyder's offer to resign his employment was revoked prior to acceptance and that his purported termination was in violation of the Teacher Tenure Act since (1) there was no written contract of resignation, (2) the associate superintendent's letter of February 22 indicated that Snyder's offer to resign was not accepted when originally tendered, (3) there was not a clear, unambiguous and unqualified acceptance of Snyder's offer, and (4) MCLA 38.172, MSA 15.2054 provides that "No teacher may waive any rights and privileges under [The Tenure Act] in any contract or agreement made with a controlling board."

[19] Id. at 3.

[20] Arnold v. New Haven Community Schs., TTC 79-11; *accord*, Stevens v. Dewitt Public Schs., TTC 77-25.

> [W]hen a resignation is submitted by a teacher, the controlling board or its duly authorized agent must provide acceptance of same to the teacher to effectuate the resignation.[21]

When a resignation is submitted by a teacher, acceptance must be clear, unambiguous, unqualified, reflect a meeting of the minds, and be in writing to be enforceable. To duly authorize an administrator to accept teacher resignations and bind the district, the board should adopt a formal resolution reflecting such authorization. These principles are illustrated in the following decisions.

A letter of resignation is not enforceable until the board has taken action to accept the letter of resignation, if the board has not authorized the superintendent to accept resignations. In *Arnold v. New Haven Community Schools*, the board argued that the teacher had submitted a letter of resignation. Several administrators and the school board president testified that they had seen and read the letter; they each described its form and contents in a similar manner. However, the letter was lost and the board never took action to accept the resignation. The Commission held that "a mere offer to resign, evidenced by the letter is insufficient, unless the board or its authorized agent takes action to accept the resignation submitted."[22]

In a footnote, the Commission stated its policy on the question as to whether an administrator can be authorized to accept resignations:

> Although in this case no proofs were submitted on the superintendent's authority to act, we note that a board of education may authorize its superintendent to accept resignations. In this instance, however, the board's past practice mitigates against a finding of it having providing [sic] such authority here.[23]

Another example of the necessity for mutual consent in resignations is *Munger v. New Buffalo Board of Education*.[24] Munger sent a letter of resignation, effective January 4, 1982, to the president of the board. The board took no action on the resignation. The Commission held that Munger's administrative contract remained effective and that he was thus obligated to continue his employment until the board took action to accept his resignation.

These resignation decisions indicate several guidelines that should be followed by teachers, school administrators, and school boards when resignations are offered.

1. If a board of education intends to empower an administrator with authority to accept resignations and bind the district, a resolution to that effect should be adopted.
2. Prior to sixty days before September 1, a teacher may resign from his position in a school district and preserve his tenure even if the controlling

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[21] Id. at 8.
[22] Id. at 6-7.
[23] Id. at 7.
[24] TTC 82-6.

board does not concur in the resignation. Within sixty days before September 1, or at any time during the school year, a teacher may resign and preserve his tenure only by mutual agreement with the controlling board.

3. The resignation should be written and be as specific as possible.
4. If the resignation is acceptable, the board, or its duly authorized agent, should accept it exactly as offered.

Changing Effective Date of Resignations

The administrative handling of a teacher's resignation must conform with general contract law as illustrated in *Wiljamaa v. Flint Board of Education*.[25]

A tenured teacher submitted her resignation on November 20, 1970 (a Friday), effective November 23, 1970 (a Monday), but an administrator or his secretary changed the effective date to November 20. Later in the day on November 20, the teacher attempted to withdraw the resignation, but school authorities informed her that it was too late to do so. In December, the board of education formally accepted the resignation. The question before the Court was whether the teacher's resignation was so altered as to be void as a matter of law. The Court held that it was, and stated:

> It is fundamental law that there must be a meeting of the minds not only to make a contract but also to rescind or modify a contract after it had been made. . . . Plaintiff's resignation was akin to an offer to rescind the contract of employment on November 23, 1970. At this point the board of education had the option to either accept or reject this offer of resignation. However, the board chose to make a counter offer by changing the effective date of the resignation to November 20, 1970. This counteroffer was neither communicated to nor accepted by the plaintiff. Consequently, there was no meeting of the minds on plaintiff's offer to resign or on the board's counteroffer. Inasmuch as there was no meeting of the minds, if follows that the contract between the plaintiff and the board was not rescinded by the tender of plaintiff's resignation.[26]

The Court emphasized the right of the teacher to offer a resignation with a specific date of resignation because of the value of benefits in the event of sickness or accident. If the school district could unilaterally change the effective date of the resignation from Monday to the previous Friday, it could thereby possibly deprive the teacher of a valuable benefit. The changing of the dates therefore materially changed the teacher's rights.

Illegality of Coerced Resignation

To prevent avoidance or circumvention of the Michigan Teachers' Tenure Act, the Michigan legislature has provided that:

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[25] 50 Mich. App. 688, 213 N.W.2d 830 (1973).

[26] Id at 690, 213 N.W.2d at 831.

> No teacher may waive any rights and privileges under this act in any contract or agreement made with a controlling board. In the event that any section or sections of a contract or agreement entered into between a teacher and a controlling board make continuance of employment of such teacher contingent upon certain conditions which may be interpreted as contrary to the reasonable and just causes for dismissal, provided by this act, such section or sections of a contract or agreement shall be invalid and of no effect in relation to determination of continuance of employment of such teacher.[27]

This statute prevents the forced resignation and surrender of future tenure rights by a probationary teacher as a condition of reemployment. A resignation given without the intention of termination of employment is ineffective and does not deny the teacher's right to tenure.

A practice sometimes considered by school administrators and boards of education to remove a tenured teacher and avoid a hearing is that of negotiating an agreement which provides that if the teacher resigns, the board will pay him for part or the rest of the year. These arrangements should be entered into only upon the advice and assistance of an attorney and with the certainty that the teacher's concurrence has been freely given. In such a situation in the state of New York, a teacher later decided not to be bound by the agreement. She brought an action to require restoration to her position with full tenure rights. The Court ruled for the teacher on the ground that the agreement was not legal:

> A dismissal without hearing, charges and findings is illegal . . . If all this can be nullified by dismissal without charges, with or without pay or bonus, the protection of teachers has been removed. For the courts to validate a "waiver" . . . by the teacher of such rights would be violative of the spirit and public purpose of the act which protects the school system by giving permanency to the job of experienced teachers.[28]

A non-Michigan case illustrates the use of duress and undue influence (sometimes termed "constructive discharge") to extract a resignation from a teacher. In *Odorizzi v. Bloomfield School District*,[29] the teacher sought to rescind his resignation, alleging that he had been arrested, questioned by police, booked, and released on bail—a process that took some forty hours, during which time he had not slept; that immediately after his release, school officials met with him in his apartment and attempted to persuade him to resign because of the nature of the charges brought against him; that the school officials attempted to get him to resign immediately; that the school officials told him if he did not resign he would be suspended immediately with attendant embarrassing publicity; that they represented themselves as his friends and as persons interested in helping him; and that at no time was he given an opportunity to consult an attorney.

The Court held that a valid cause of action existed for rescission based on undue influence, and, it stated that undue influence, usually involves several elements. These include: 1) discussion of the transaction at an unusual or inappropriate time; 2) consummation of the transaction in an unusual place; 3) insistent demand that the business be finished at once; 4) extreme emphasis on the untoward consequences of delay; 5) use of multiple persuaders by the dominant side against a single servient party; 6) absence of third-party advisors to the servient party; and, 7) statements that there is no time to consult financial advisors or attorneys.[30]

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[27] MCLA 38.172, MSA 15.2054.

[28] Boyd v. Collins, 11 N.Y.S.2d 228, 231, 182 N.E.2d 610, 613 (1962).

[29] Odorizzi v. Bloomfield Sch. Dist., 54 Cal. Rptr. 333, 246 C.A.2d 123 (1966).

Constructive discharge has been defined by the Michigan Court of Appeals:

> Although "discharge" is not specifically defined in the statute, it can only mean an involuntary termination of employment in the context of the act. The term "constructive discharge" has been used to describe a facially voluntary termination which should legally be considered an involuntary one. A constructive discharge occurs "when the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." A constructive discharge involves the employer's deliberate effort to make things difficult for an employee, thus forcing him or her to resign. Before a constructive discharge may be found, the trier of fact must be satisfied that working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.[31]

In *LeGalley v. Bronson Community Schools*,[32] the Court of Appeals held that constructive discharge had not been proven.In *LeGalley*, the plaintiff claimed that he had been denied salary increases for two consecutive years because of the board's dissatisfaction with his work as a principal, that he was told that salary disparity would continue, and that he was asked to resign. Because LeGalley was unable to present evidence of onerous working conditions or harrassment, the court found that the proofs were clearly inadequate to show constructive discharge. The court opined that although unequal pay may be a factor that may support constructive discharge, "a difference in pay alone cannot support a finding that a reasonable employee would have been forced to resign."[33]

Abandonment[34]

The Tenure Act carries with it the presumption that if there is not a knowing, formal, and written resignation, a teacher will continue to render services to the controlling board. Abandonment is the discontinuance of services by a teacher without the controlling board's consent. Since a voluntary relinquishment of a teaching position constitutes a waiver of tenure rights, it is essential that abandonment claims be well founded and not merely a subterfuge to deny a teacher his rights.

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[30] Id.

[31] LeGalley v. Bronson Community Schs., 127 Mich. App. 482, 486, 339 N.W.2d 223, 225-26 (1983) (citations omitted).

[32] Id.

[33] Id at 487, 229 N.W.2d at 226. The Tenure Commission (TTC 79-52) had held that the Bronson Board of education had violated LeGalley's tenure rights by denying a salary increase as part of a concerted effort to force him out of his position.

[34] For decisions on abandonment caused by failure to respond to a recall from layoff see Chapter V.

Before a school board can revoke a teacher's tenure rights for abandonment, the teacher must be offered a hearing. If abandonment has been asserted, the controlling board carries the burden of proving that the teacher's course of conduct and/or comments constitute abandonment.[35]

The remedy for failure to provide a hearing for abandonment is not reinstatement and backpay, but restoration of tenure and an offer of a hearing. After the hearing, the board should determine again whether the teacher has abandoned his position and whether tenure rights should be forfeited. The teacher has the right to appeal the board's decision.

In *Purcell v. Ferndale School District*,[36] the Commission set out the factors which constitute a finding of abandonment.

> Abandonment is composed of two elements: (1) an overt act or failure to act by the party coupled with (2) an intent to totally and absolutely relinquish the position assigned. The burden of proving this claim falls upon the party asserting it. . . .[37]

In *Purcell*, despite the teacher's insistence that he did not intend to abandon his position, the Commission viewed his actions and statements as a whole and determined that that he did not perform his assignment after repeated requests and warnings. These facts clearly supported the conclusion that both "overt act" and "intent to relinquish" were established.

The actions of teachers can establish abandonment. Several examples are discussed below.

Course of Conduct and Comments

In *Zupin v. Grand Haven Public Schools*,[38] a teacher (Zupin) had been laid off in 1974.In 1981, Zupin applied for a vacancy that was subsequently filled by a probationary teacher. She argued that she should have been appointed to the vacancy. The Commission determined that Zupin had abandoned her rights to a position in the district by her actions and comments.First, before the district had taken any action to lay her off, Zupin had stated an interest in staying home to care for her children and said that she would not return in the fall of 1974. Then in 1977, she had told the district's new personnel director that she "used to work" in the district. Zupin's husband had stated that she had left the district in order to be with her young children. Zupin had told school administrators that she was pleased to have a chance to stay home with her children. Finally, when she had applied for the vacancy in 1981 she had indicated that her reason for leaving Grand Haven had been for "child rearing."The fact that she had not inquired about reemployment between 1974 and 1981 also showed that she had relinquished her employment rights in the district.

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[35] Zupin v. Grand Haven Public Schs., TTC 81-69; Jacques v. Beecher Bd. of Ed., TTC 79-6; Carswell v. Wayne-Westland Community Schs., TTC 78-36; Purcell v. Ferndale Sch. Dist., TTC 76-56.

[36] TTC 76-56.

[37] Id. at 4 (citations omitted).

[38] TTC 81-69.

Conflicting Employment

In an early abandonment decision, the Commission held that by signing, and teaching under, a full-year contract in a school district in another state, the teacher had "executed total abandonment of her tenure position in the Taylor school district." Although she taught only a few days, the days were concurrent with days she would have taught in the Taylor district.[39]

In *Herman v. West Bloomfield School District*,[40] a former superintendent was offered a teaching position in the district upon the termination of his administrative contract. He informed the district that he could not report for work because he had accepted employment in the Whitmore Lake school district. The West Bloomfield Hills Board informed Herman that his reasons were unacceptable, that he should report for work, and that his failure to do so would be treated as abandonment. The Commission held that Herman's action of failing to report for work at the assigned building, time, and date easily satisfied the first necessary element of abandonment. Herman, however, asserted that because economic necessity had required his to accept employment in another district, his failure to report for work in West Bloomfield could not be treated as abandonment. Herman relied on *Tomiak v. Hamtramck School District*,[41] where the Commission had found that the statutory right to recall may survive a refusal of the first vacancy if the teacher refused because he was under contract to another Michigan public school district. The Commission held that Herman was not protected by the *Tomiak* holding. First, he accepted the assignment in another district after he had been offered a teaching assignment in West Bloomfield. Second, the contract in the other district could have been terminated by mutual agreement, and there was no evidence that such a termination had ever been requested. The Commission found that the evidence clearly revealed that Herman intended to abandon his employment in West Bloomfield.

In *Carswell v. Wayne-Westland Community Schools*,[42] the teacher, who had been granted a leave of absence from Wayne-Westland, had obtained a teaching position in Highland Park. The board argued that the teacher's acceptance of the Highland Park position constituted an intent to terminate his employment in Wayne-Westland. The Commission ruled that the Tenure Act does not prevent a teacher from obtaining employment elsewhere during a leave of absence.[43] The Commission found, however, that Carswell had abandoned his position. He had been having employment problems in Wayne-Westland that resulted in stress and anxiety. He did not inform Highland Park administrators when he was hired that he intended to work for only one year. He was aware of the position in Highland Park at the time he sought the leave of absence from Wayne-Westland. When the Wayne-Westland board notified Carswell that they considered his employment with Highland Park improper and that he had been terminated, he took no action. At the commencement of the following year, the board held a position open for Carswell and he failed to perform. The Commission found this to be indicative of his intent to abandon his position with Wayne-Westland. The Commission stated that "this failure to perform was coupled with an intent by Appellant to totally and absolutely relinquish his assigned position with Appellee."[44]

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[39] Johnson v. Taylor Sch. Dist., TTC 69-17.

[40] TTC 83-16.

[41] TTC 80-54.

[42] TTC 78-36.

The Commission's decision in *Munger v. New Buffalo Board of Education*[45] describes another factual situation that established abandonment. Munger submitted a letter of resignation from his position as elementary principal with retention of his rights as a tenured teacher in the district. The board took no action on the letter of resignation.[46] (It has been held that a resignation is an offer to terminate a contract that can be accepted or rejected by the board; and that written acceptance must be provided of same to the teacher to effectuate the resignation). Thus, Munger's administrative contract was not mutually terminated; it was still in force, and he was obligated to continue his employment until the board took action on his resignation. Munger had failed to report to his position as principal following winter recess, had given up his apartment in New Buffalo, had enrolled in an out-of-town university for courses that began on the date of the requested resignation, and had failed to communicate with the school district after submitting his letter of resignation. These actions showed that Munger had intended to relinquish his position as principal and his employment relationship with the school district.

In *Glynn v. Millington Community Schools*,[47] the appellant had been dismissed as superintendent in the district and therefore had a right to a teaching position in the district. The Commission found that Glynn's "course of conduct" indicated that he did not want to teach in the district and that this established abandonment. His comments and conduct included a statement made to a school board candidate that he, Glynn, would be "crazy" to accept a teaching position in the district; testimony that it would be difficult for him to perform effectively in a classroom position; and demand for termination pay—a benefit that he knew he would not be entitled to until he ceased to be an employee of the district. The Commission found that these comments and actions were sufficent to show that Glynn had no desire or intention to continue his employment relationship with the Millington District as a classroom teacher.

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[43] Id. at 6. The Commission stated: "We conclude that there is no provision in the Teachers' Tenure Act which would preclude a tenured teacher from obtaining employment including a teaching position with another school district during an approved leave of absence."

[44] Id. at 9-10.

[45] TTC 82-6.

[46] Wiljaama v. Flint Bd. Educ., 50 Mich. App. 688, 213 N.W.2d 830 (1973).

[47] TTC 79-24.

Breach of Sabbatical Leave

The Commission and the courts have considered the question of whether the breach of a sabbatical leave agreement constitutes a discontinuance of service. A request for, and use of, a sabbatical leave as a ruse, perpetuated against a school board to believe the teacher's true intent, constitutes abandonment.

In *Rumph v. Wayne Community School District,*[48] a tenured teacher had been granted a sabbatical leave for one school year at one-half pay in order to do research approved by the board, with interim and final reports required. The teacher failed to file a report due in January and did not answer two written inquiries. The school board did not offer the teacher a contract for the next school year. The board alleged that he had breached the sabbatical leave agreement, which, the board claimed, constituted a discontinuance of services without the controlling board's consent.

In reversing the lower court and finding for the teacher, the Court of Appeals stated:

> To affirm the decision of the circuit court could mean that school boards could avoid the procedural requirements of Article IV merely by finding that the techer had improperly discontinued services under MCLA Section 38.111 (stat Ann 1968 Rev Section 15.20111). Such a result would certainly discourage a tenure teacher from taking a sabbatical leave, because the possibility would exist that such a determination would be made without the teacher being provided with the procedural protection of Article IV.[49]

The court further stated that the procedural approach of summarily dismissing tenured teachers placed the burden on the tenured teacher to persuade the Tenure Commission that he should not have been dismissed, when the burden should be placed on those making the charges against the tenured teacher.

Engaging in a Strike

A question has arisen as to whether the withholding of services because of a labor dispute constitutes a discontinuance of services. In considering this issue, the Attorney Genral reviewed the findings in *School District for Holland v. Holland Education Association,*[50] and stated:

> The majority of the court held that the teachers temporarily withholding their services because of a labor dispute were, nevertheless, employees of the district even though not

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[48] Rumph v. Wayne Community Sch. Dist., 31 Mich. App. 555, 118 N.W.2d 71, (1974).
[49] Id. at 562, 118 N.W.2d 74.
[50] 380 Mich. 314, 157 N.W.2d 206 (1968).

> under contract with the school district. . . . If they are considered employees for the purposes of Act 336, PA 1947,[51] . . . . there is no valid basis to conclude that they are no also employees of the school district for the purpose of the tenure of teachers act . . . . contrary to Article 2, Section 1, of the Tenure of Teachers Act.[52]

This same question arose in *Shiffer v. Gibraltar Schools.*[53] The board argued that a teacher who strikes thereby discontinues his services under the Tenure Act and is not entitled to the Act's protection. The *Shiffer* court declined to answer the question, holding that the decisions of the Tenure Commission[54] and circuit court[55] were *res judicata*, that is, already decided. The Commission had held, and the circuit court agreed, that there was no legislative intent to deny previously acquired tenure rights to striking teachers. No other cases interpreting the relationship between "discontinuing service" and strikes have been litigated. The current legal principle is that a teacher who strikes does not by that act automatically discontinue his services. However, a school board does have the authority under provisions of the Public Employees' Relations Act, to discipline or discharge any teacher who strikes.[56]

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[51] MCLA 423.201 *et seq.*, MSA 17.455(1) *et seq.*

[52] 1969-70, p. 150, OAG No. 4704 (June 24, 1970).

[53] 393 Mich. 809, 224 N.W.2d 255 (1974).

[54] Skubik v. Givraltar Sch. Dist., TTC 68-22. Prior to Shiffer's disciplinary discharge, Shiffer and other striking teachers, including Skubik, had appealed to the Tenure Commission from the board's notice, which charged that by striking the teachers had forfeited their rights to continuing tenure.

[55] Shiffer v. Gibraltar Sch. Dist., No 13439, Circuit Court, Ingham County (Dec. 6, 1972).

[56] MCLA 423.206, MSA 17.455(6); Rockwell v. Crestwood Bd. of Educ., 393 Mich. 616, 227 N.W.2d 736 (1975).

CHAPTER IX

Procedures for Discharge and Demotion at the Local District Level

Complexity of Tenure Proceedings

Tenure laws do not prevent the dismissal of incompetent teachers; the procedures to follow, however, are complex. The teacher may muster support from inside and outside the schools.Students frequently become involved. It becomes a public issue. A school administrator may be reluctant to testify in a teacher dismissal proceeding because he may be put in the position of defendant during cross-examination. The administrative staff must lend its fullest support to a school administrator who assumes the burden of filing charges and facing the dismissal proceeding of an incompetent, insubordinate, or immoral teacher.

Whenever a controlling board demotes or dismisses a tenured teacher, it faces the possibility that the decision will be appealed to the Tenure Commission. The ultimate outcome of the board's decision, therefore, is in doubt until the teacher decides whether to appeal or until the Tenure Commission renders a decision. If the Commission reverses the board and orders reinstatement of the teacher, the school district can either appeal the Commission's order to the Circuit Court or reinstate the teacher.

Because of the possible damage to the teacher's reputation and the financial risk to the school district, a board of education should enter into dismissal proceedings of a tenured teacher with caution and only on strong recommendation of its chief administrative officer, the person filing the charges, and legal counsel. Board members should expect that the teacher will appeal a demotion or dismissal and should be prepared to defend their decision before the Tenure Commission.

Importance of Proper Procedure

Tenure matters must be conducted according to proper procedures, and the evidence produced at the hearing must support the board's decision. The Tenure Act's procedural requirements for conducting a hearing are as important as its substantive requirements; school boards are well advised to give careful consideration to both. Statutes, court interpretations, Tenure Commission decisions, and opinions of the Attorney General offer procedural guidelines to be followed by a school board in deciding issues arising under the Michigan Teacher's Tenure Act. Many of these procedural matters are discussed in this chapter.

Not every procedural error is "fatal"—that is, requiring reinstatement of the teacher. To require reinstatement because of procedural error it must be shown that the teacher's rights under the Act were actually diminished. This is illustrated in *Pounder v. Harper Woods Board of Education*.[1] The error complained of in *Pounder* was the board's failure to subpoena a witness. The Commission ordered reinstatement. On appeal, the Court of Appeals reversed, finding reinstatement an inappropriate remedy when injury to the teacher had not occurred. The Court stated:

> [I]n the instant case a hearing was held, accompanied by proper notice and representation, and according to the general dictates of due process. A dispute arose as to the evidence to be admitted as to the opportunity to fully and properly explore on cross-examination the details of the medical report. Cure of this error is simple, and fair, and justice will be done by ordering a remand and supplementation of the record.[2]

Following the Court of Appeals decision in *Pounder*, the Tenure Commission adopted the policy that to require reinstatement "the procedural error claimed must interfere with the teacher's basic right to a fair, impartial hearing and must so taint the statutory proceedings as to render the discharge invalid."[3] Following this announced policy, the Commission has seldom ordered reinstatement because of procedural error.[4] Generally, substantial compliance with the procedural safeguards of Article IV, Section 2 of the Act is sufficient.[5]

Despite this announced policy, a review of Commission decisions over the past few years reveals increased attempts on the part of teachers to overturn board decisions for procedural error. For example, a recent decision of the Commission included the following allegations of procedural error.

> Did the school board's statement at a public hearing that it would consider tenure charges against appellant violate his right to a private hearing?
>
> Did the Board err in considering and using as a basis for tenure charges, allegations relating to misconduct with a student, where such allegations stemmed in part from conduct which occurred prior to the 1982-83 school year?

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[1] 72 Mich. App. 717, 250 N.W.2d 504 (1976).

[2] Id. at 725, 250 N.W.2d at 507.

[3] Beyers v. Algonac Community Schs., TTC 77-17 at 5.

[4] Kachaterian v. Taylor Public Schs., TTC 77-22. (board member filed charges, testified at the hearing against appellant, and participated in the decision to dismiss); Ferrario v. Escanaba Area Schs., TTC 81-47. (board acted to bring charges against the teacher and then served as decision maker). The Escanaba Board appealed this decision and the Supreme Court held that the Commission failed to properly review the record of Farrario's dismissal to determine whether actual bias or a high probability of actual bias existed. Moreover, if such bias had been found, the Commission should have performed a de novo review on the merits before ordering reinstatement or backpay; Farrario v. Escanaba Bd. of Educ., 426 Mich. 353, N.W.2d (1986).

[5] Morgan v. Galesburg-Augusta Community Schs., TTC 85-11.

> Did the Board violate the Elliott-Larsen Civil Rights Act, MCL 37.2205a, MSA 3.548(205a), which precludes an employer from maintaining records concerning employees' arrests not resulting in convictions?
>
> Did the Board improperly assume the role of charging party and deny appellant his due process right to a fair and impartial decision-maker?
>
> Must the Board's decision be reversed due to a failure to find that appellant's conduct had an adverse effect on the school district, staff, students, or the public?
>
> Did the Board abuse its discretion by postponing its view of the rest area which was the subject of charge 1 until after all evidence had been presented?
>
> Did the Board err in refusing to dismiss charge 2, relating to misconduct with a student, on the ground that it was vague and denied appellant due process of law?
>
> Did the Board abuse its discretion by admitting lay opinion testimony and testimony allegedly not part of the tenure charges?
>
> Did the Board violate MCLA 38.104(b), MSA 15.20004(b) by failing to take action against appellant through a majority of the members of the controlling board?
>
> Did the Board err in including in its decision findings of misconduct which were not part of the tenure charges?[6]

In considering substantive matters, the role of the board of education is twofold. First, the board must determine whether it has been established by a preponderance of the evidence that the alleged conduct occurred. Second, the board must decide whether the established conduct constitutes reasonable and just cause for demotion or discharge. The burden is always on the school district to prove the charges; the teacher is under no legal obligation to disprove them. Furthermore, the teacher has a right to appeal any decision of the board. On appeal, the Tenure Commission has the authority to review the entire matter in a *de novo* proceeding.

Past decisions indicate that the Tenure Commission will likely uphold the dismissal of a teacher, provided that the procedures at the board hearing have not prejudiced the teacher's rights, that the board's expectations of the teacher have been communicated to him, that there is irrefutable evidence to show he was sufficiently warned of his inadequacies, and that he has been given professional assistance to improve his teaching and time to correct identified deficiencies.

Making Formal Charges

A tenured teacher may be dismissed only after written charges have been filed with him and with the controlling board.It is mandatory that the charges against the teacher be in writing, signed by the person making the charges (usually the teacher's principal, supervisor, or superintendent), and filed with the secretary or other designated officer of the board.[7] The board has the sole authority to decide whether to proceed with the charges.[8] The board should conduct an independent review of the charges and enter in the board's minutes its decision whether to proceed.[9]

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[6] Mabry v. Wyoming Public Schs., TTC 83-21 at 2-3.

[7] MCLA 38.102, MSA 15.2002. Lawson v. Wayne Community Sch. Dist., 63 Mich. App. 57, 233 N.W.2d 713 (1975).

The written charges filed with the board must include the signature of the individual who has made the charges.[10] The purpose of the charges is to provide the teacher with a clear basis for the preparation of a defense.[11] On appeal, the Tenure Commission will review the charges to determine whether this purpose has been met.[12]

If charges are filed, withdrawn, amended, and refiled in order to correct a procedural defect, the Commission applies the following criteria to determine the appropriateness of the action:

> Specifically, a controlling board may take this action only if the error can be simply corrected, and justice and fairness will be served; the corrective action does not take the teacher by surprise, thereby precluding a fair hearing; the correction does not result in undue delay; the correction is not motivated by bad faith or dilatory purpose; and, the corrective action must be calculated to cure the existing defect without creating new errors.[13]

Questions have arisen as to whether a teacher's tenure rights are violated when the board votes at an open meeting to proceed on the written charges. It has been held that the right to a private hearing guaranteed under the Tenure Act does not necessarily include the right to privacy in the decision to proceed on the charges. School boards are required by statute to conduct their business at public meetings. Thus, the nature of the charges, the individual filing them, and board's decision to proceed on the charges are a matter of public record.Thereafter the teacher has the option to have a public or private hearing.[14]

A controlling board is not authorized to review or weigh evidence at the time it decides to proceed on tenure charges.[15] In a case where at one meeting a school board both received charges against a teacher and adopted a resolution that it had established that sufficient evidence to support discharging him, the Tenure Commission found that the board's action violated the due-process requirements of the Tenure Act, and ordered reinstatement of the teacher.[16]

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[8] Biberstine v. Port Austin Sch. Dist. No. 9, 51 Mich. App. 274, 214 N.W.2d 729 (1974). Neither the board nor a member of the board should be the charging party. Ferrario v. Escanaba Area Public Schs., TTC 81-47; Kachaterian v. Taylor Public Schs., TTC 77-22

[9] Failure to make an independent review of the charges and decision to proceed on the charges may not be a fatal error if the teacher actually had full due process. In Simon v. Gibraltar Sch. Dist., 52 Mich. App. 643, 217 N.W.2d 891 (1974), the teacher claimed a denial of due process because the local board of education conducted the hearing without having made a prior independent review of the charges and decision to proceed on the basis of the charge. The Court of Appeals rejected the teacher's claim on the basis that both the "notice" and the "hearing" were provided and the existence of an independent review and decision might be inferred. The Court found that not even the least vestige of prejudice could be claimed from the procedure and termed the teacher's claim "closely akin to indulgence in idle ceremony." Id. at 647, 217 N.W.2d at 893.

[10] Lawson v. Wayne Community Sch. Dist., 63 Mich. App. 57, 233 N.W.2d 713 (1975). In this decision the secretary of the board of education, rather than the person making the charges, signed the charges.

[11] Earhart v. Eaton Intermediate Sch. Dist., TTC 74-22.

[12] Dennis v. Flint Bd. of Educ., TTC 77-11.

[13] Streeter v. Bd. of Educ., River Rouge, TTC 78-48 at 7.

[14] Jensen v. Ludington Area Sch. Dist., TTC 82-63; Sprik v. Grandville Public Schs., TTC 74-40-2-R.

[15] Linders v. Portage Public Schs., TTC 72-14.

A controlling board may determine not only whether it wishes to proceed on charges, but also whether it wishes to proceed on *all* the charges or on only a limited number.[17]

When furnishing the teacher with a list of the charges, the board is not required to provide a list of witnesses and a statement of the nature of their testimony.[18] In this regard the Commission recommended that "[h]ad Appellant sought a list of witnesses, due process would be best served by providing same to the teacher. However, we do not find its absence, where a specific request is not made, a denial of due process."[19]

The written charges should be as specific as possible, for it is difficult to defend oneself against general charges. A charge is not vague and ambiguous simply because it does not state each and every factual occurrence of the inadequacy complained of.The charging party is not required to establish its case in the written charges by a preponderance of the evidence. Due-process is met when the charging party has provided the teacher with a reasonable basis on which to prepare a defense.[20]

General and conclusive allegations do not provide sufficient notice intended by the statutory provision. The following statements were held to be conclusive charges and insufficient.

"1. The health, safety and welfare of the students in your classroom is in jeopardy.

"2. The deficiencies in the total instructional program for your second grade class that have been pointed out to you.

"3. A demonstrated lack of cooperation with the principal and others on a number of occasions and agreements as to future action in the classroom have been ignored by you."[21]

Charges deemed by the Tenure Commission to be sufficiently specific were given in *Chambers v. Roseville Board of Education*.

"a. Mr. Chambers had failed to maintain a satisfactory degree of order in the classroom so that learning could take place.

"b. Mr. Chambers had failed to accept administrative direction and counseling given in an effort to improve the classroom organization.

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[16] Dimitruck v. Utica Public Schs., TTC 74-3.

[17] Chambers v. Roseville Public Schs., TTC 73-69.

[18] Knox v. Benton Harbor Area Schs., TTC 79-41 at 8.

[19] Id.

[20] Lawson v. Wayne Community Sch. Dist., 63 Mich. App. 57, 233 N.W.2d 713 (1975); Thorsen v. Carrollton Sch. Dist., TTC 81-76.

[21] Id. at 59, 233 N.W.2d at 714.

"c. Mr. Chambers had failed to control the movement of his students; permitting them to leave the classroom without authorization and in contradiction to established rules.

"d. Mr. Chambers had made no effort to communicate with the parents of children with whom he was having difficulty except as appointments were made for him for the principal."[22]

A tenured teacher is not disqualified from the procedural and substantive due-process protections of the Tenure Act even if criminal charges have been filed against the teacher in criminal court. The board in *Wright v. Port Huron Area Schools*,[23] argued unsuccessfully that felony charges brought against the teacher made it unnecessary for the board to conduct a hearing.

If a teacher does not understand the charges, he should request a bill of particulars that specifically explains the meaning of every charge.[24] The request should be made at the hearing and should not be frivolous. In one case, a teacher's request for further explanation of the charges was denied by the controlling board on the ground that the teacher was well aware of the meaning. The board's refusal to furnish a bill of particulars under these circumstances was held not to be a denial of due process.[25]

The Tenure Act requires that charges regarding the "character of professional services" be filed with the controlling board sixty days prior to the end of the school year.[26] "Character of professional services" refers to an individual's competence and performance in the classroom. The Commission has adopted the following definition of the phrase"[27]

> A "professional" act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. . . . In determining whether a particular act is of a professional nature or a "professional service" we must look not to the title of character of the party performing the act, but to the act itself.[28]

The Tenure Commission has held that the charges are not complete unless a statement of the detrimental effect to teachers, students, and staff of the teacher's violation of school policy is included in the charges. The Commission quoted this rule from private decisions:

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[22] Chambers v. Roseville Bd. of Educ., TTC 73-69.

[23] 13 Mich. App. 1, 163 N.W.2d 673 (1968).

[24] Pell v. Roseville Bd. of Educ., TTC 73-69-R.

[25] Wetsman v. Fraser Sch. Dist., 62 Mich. App. 104, 233 N.W.2d 500 (1975). The record of the hearing before the Commission made it conclusively evident that the teacher understood the charges.

[26] MCLA 38.102, MSA 15.2002.The end of the school year in all Michigan districts is June 30. Ajluni v. West Bloomfield Sch. Dist., 397 Mich. 462, 245 N.W.2d 49 (1976). The statute does not require the board to serve the notice on the teacher sixty days prior to the close of the school year; the statute requires that the charges be *filed with the board* sixty days prior to the close of the school year. The statute places time limits on "filing of charges" but is silent as to time limits on "serving the charges."

> The *Beebee* rationale mandates that detrimental effect is an issue in determining just and reasonable cause under Article IV. We believe, therefore, that for the notice provisions of Article IV to meet the requirements of due process (notice of the charges to be met), the charging party must include in the statement of charges sufficient allegations to place the teacher in question on notice as to the detrimental effect resulting to the district from the teacher's actions. Failure to include such allegations in the charges filed warrants reinstatement as this error so taints the board proceedings as to render the discharge invalid.[29]

While all of a teacher's actions are potentially related to his ability to teach, some offenses (unprofessional relations with students and insubordination) clearly fall outside the definition of "character of professional services." Charges related to such offenses may be filed at any time. In this regard the Commission has stated:

> It is clear that "character of professional services" relates to an individual's ability to teach. Though one may argue that all actions by a teacher relate to the teacher's ability to teach, the specific charges here—violation of school discipline standards and insubordination—are charges outside this all encompassing term. Should this Commission adopt such a broad definition as proposed by Appellant, it could effectively prevent a local board from taking justifiable action against a teacher for improper conduct constituting reasonable and just cause for demotion or dismissal. We do not believe the intent of the 60 day requirement was to bar such charges.[30]

The statute does not set a time limit for the serving of such charges on the teacher, but it must be within a reasonable time after the charges have been filed and prior to a hearing. The hearing cannot be less than thirty days nor more than forty-five days after the charges are filed.

Proceeding on the Charges

If the board decides to proceed, the teacher must be furnished with a written statement of the charges, including a statement of his rights.[31] Since the discharge of a tenured teacher can be accomplished only by strict compliance with procedural safeguards, failure to provide the "statement of rights" is a procedural error.[32] Providing the statement of rights *after* the initial hearing will not cure the defect.[33] The appropriate remedy would be for the board of education to cancel the hearing and again send a copy of the charges, affixing a copy of the teacher's

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[27] Knopf v. Flint Bd. of Educ., TTC 78-41.

[28] Swassing v. Baum, 240 N.W.2d 24, 27 (Nebraska, 1976).

[29] Huber v. Big Rapids Public Schs., TTC 83-33 at 5 (citations omitted).

[30] Jessup v. Sandusky Community Schs., TTC 77-32.

[31] MCLA 38.102, MSA 15.1002. Providing the teacher with a copy of the Tenure Act fulfills the school district's legal obligation to provide a statement of the teacher's rights.

[32] Biberstine v. Sch. Dist. of Port Austin, 51 Mich. App. 274, 214 N.W.2d 729, (1974); Jessup v. Bd. of Educ., Sandusky, TTC 77-32.

[33] Fucinari v. Dearborn Bd. of Educ., 32 Mich. App. 108, 188 N.W.2d 229 (1971).

rights. In order that school boards may easily comply with this procedural requirement of the Tenure Act, the State Department of Education makes available to all school districts up-to-date copies of the Tenure Act. As with notice to probationary teachers, the school district has the burden of proof that the written charges were actually delivered to the teacher.

The written charges and statement of rights should be hand-delivered or sent through mail to the teacher's home address; the board should obtain return receipt. Notice of the charges by word of mouth would not constitute legal notice. Even if the teacher attended the board meeting at which the decision was made to send him the written charges, his attendance would not constitute legal notice. The actual notice, when given, must be written. If a teacher is handed a copy of the written charges, he cannot refuse it and later claim that no notice was given.[34] The charges may be amended after having been served, provided the teacher is given ample time to prepare to meet the new allegations.

School Board Hearing

A teacher has the option of requesting a hearing after charges and a statement of his rights have been served on him. If the teacher voluntarily waives his right to a hearing before the board of education, he is not precluded from seeking redress before the Tenure Commission, provided he does so within the appeal period prescribed by the Act. If the teacher takes no action to respond to the charges, he bears the responsibility of keeping himself apprised of the board's actions so that he may make a timely appeal.[35]

If the teacher requests a hearing, the board must grant it. If the hearing is denied, the teacher may appeal to the Tenure Commission. A hearing is not automatic, however; it follows at the request of the teacher, and the request must be definite. If a teacher receives a copy of the written charges and does not request a hearing, the board may decide on dismissal or demotion without injustice to the teacher.

The hearing, if requested, must take place not less than thirty nor more than forty-five days after the filing of charges.[36]

The Tenure Act specifies how the hearing shall be conducted.[37] The hearing shall be public or private at the option of teacher. An allegation has been made that the purpose of a private hearing is to protect the privacy and reputation of the teacher, and that if the decision to proceed on the charges is taken at an open meeting this right is violated. In rejecting this analysis, the Commission delineated the purpose of the private hearing:

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[34] See 92 A.L.R.2d 751 for a review of sufficiency of notice of intention to discharge teacher or not to renew contract under statutes requiring such notice.

[35] Trowt v. Beecher Sch. Dist., TTC 80-27; Stallworth v. Sch. Dist., TTC 78-45; Tolliver v. Carrollton Bd. of Educ., TTC 76-37.

[36] MCLA 38.102, MSA 15.2002. The teacher may waive this statutory time limit by an adjournment.

[37] MCLA 38.104, MSA 15.2004.

> The Teachers' Tenure Act was enacted to protect teachers who have demonstrated their qualification and capabilities from political, personal, or arbitrary interference with their employment, thereby promoting the public welfare. We believe the privacy provision was included to permit a board to conduct its hearing free from the public clamor and passions which often arise concerning these matters. It permits the board to dispatch its role as trier of fact free from the political ramifications and influences inherent in a public hearing.
>
> It is not disputed that the board resolution on Sprik's discharge was released to the public. Does this release require reinstatement? The public was aware that charges had been filed and hearings had taken place. The fact that appellant was ultimately discharged does not, on the record before us, disclose a fact situation frustrating appellant's right to due process or preventing a fair and impartial determination by the board. We believe that unless such a showing is made, reinstatement is not required.[38]

The private hearing provision also serves the purpose of furthering the teacher's due-process rights by helping to preserve the impartiality of the decision maker.[39]

If the teacher decides to have a public hearing, it must be held in a room adequate to accommodate his friends. Once a teacher elects a private hearing, the board's decision may not be disclosed publicly until the teacher has exhausted the appellate process.[40] In *Royal Oak School District v. Schulman*, the Court stated:

> We hold that where a teacher elects a private hearing the board of education's decision to dismiss or demote may be kept private until the teacher has exhausted the appellate processes.[41]

The Open Meetings Act,[42] which was adopted subsequent to the *Schulman* decision, specifically allows for "closed" sessions of a school board to conduct a tenure hearing and to make its decision. The Act provides:

> A public body may meet in closed session only for the following purposes: (a) To consider the dismissal, suspension, or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member, or individual agent, when the name person requests a closed hearing.[43]

The Attorney General has ruled that it is unnecessary for a controlling board to terminate a teacher at a public meeting to satisfy the notice requirements of the

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[38] Sprik v. Grandville Public Schs., TTC 74-40-2-R at 9, *accord*, Mabry v. Wyoming Public Schs., TTC 83-21; Jensen v. Ludington Area Sch. Dist., TTC 82-63; Schaumann v. Lakeview Public Schs., TTC 82-49.

[39] Rehberg v. Melvindale, Ecorse Township Sch. Dist. No. 11, 345 Mich. 731, 71 N.W.2d 131 (1956).

[40] 1959-60, pt. 1, p. 177, OAG No. 3296 (September 1, 1959).The Attorney General ruled that if a teacher elects to have a private hearing, it remains private throughout the hearing and decision process until the final decision is reached.

[41] 68 Mich. App. 589, 593, 243 N.W.2d 673, 675 (1976).

[42] MCLA 15.251, MSA 4.1800(1) repealed in 1976 and replaced by Open Meetings Act, MCLA 15.261, MSA 4.1800(11). The pertinent new section being MCLA 15.265, MSA 4.1800.

[43] MCLA 15.265, MSA 4.1800.

Open Meetings Act.[44] The statute permitting a board of education to render a private decision must be given precedence over the general statute requiring such boards to officially act at public meetings.

Impartiality of School Board Members

If the board decides to proceed with a hearing, the administration appears on behalf of those who have filed the charges. The burden of proof is on the school district to show reasonable and just cause for discharging the tenured teacher. The role of the school board is to represent the public.

A teacher has a right to a hearing before an unbiased and impartial decision maker. An impartial tribunal is one whose members have no "personal or financial stake in the decision that might create a conflict of interest."[45] There is a presumption that school board members conduct the district's business with honesty, integrity, and in good faith. The teacher carries the burden of showing partiality of the board. Unless a board member is shown to be incapable of judging a particular controversy fairly on the basis of its own circumstances, he cannot be disqualified.

The question of whether a school board can be sufficiently impartial to conduct a teacher tenure hearing has been discussed by the Court of Appeals:

> The charge that the attorney presenting the cause, the personnel director, the supervisor, and the school principal were allies of the school board such that they were all eager for the same outcome and disposition is unsupported.The board was not an opponent having an interest completely opposite of the plaintiff's. The controlling board represents the public interest in securing an educational system for its students. These aforementioned witnesses were providing testimony challenging the plaintiff's continued employment status while unable to discharge her duties. The board does not have an interest in sustaining either 'side' beyond protecting the student body.—A school board is not so intimately involved in the employment status of its teachers as to be partial.[46]

It is not necessary to prove the actual bias or prejudice of a board member in order to show bias. The Tenure Commission[47] utilizes the following test to determine partiality:

> The United States Supreme Court has disqualified judges and decisionmakers without a showing of actual bias in situations where "experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally

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[44] 1977-78, p. 21, OAG, No. 5183 (March 8, 1977).

[45] Hortonville Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482, 492, 96 S.Ct. 2308, 2314, 49 L.Ed.2d 1, 9 (1976).

[46] Rogers v. Trenton Bd. of Educ., 61 Mich. App. 682, 691-692, 233 N.W.2d 141, 146, (1975) (emphasis added).

[47] Mabry v. Wyoming Public Sch., TTC 83-21; Kachaterian v. Taylor Public Schs., TTC 77-22.

> tolerable." Among the situations identified by the Court as presenting that risk are where the judge or decisionmaker:
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> (1) has a pecuniary interest in the outcome;
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> (2) has been the target of personal abuse or criticism from the party before him;
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> (3) is "enmeshed in [other] matters involving petitioner. . .."; or
>
> (4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decisionmaker.[48]

Partiality may be shown in the framing of the resolution to proceed on the charges. In *Dimitruck v. Utica Community Schools*,[49] at the same meeting where charges were presented against the teacher, the board adopted a resolution that sufficient evidence had been presented to it to support his discharge. The Commission ruled that basic fairness and due process required reinstatement of the teacher.

In *Mabry v. Wyoming Public Schools*,[50] the teacher asserted that the board's resolution to proceed on the charges revealed that the board had assumed the role of charging party and had prejudged the case. The assertion was based on the language of the board's resolution. The phrase contested was "and that this constitutes just and reasonable cause for discharge."The Commission found that this phrase did not disqualify the board as impartial decision maker. The language merely reflected the filing of the charges and the charging party's belief, rather than the board's, that they were reasonable and just cause for discharge.

A board member cannot be the charging party or a witness and still participate in the decision on the charges.The Commission dealt with a case in which a board member who had discovered and testified about liquor in a refrigerator in the superintendent's office then participated in the deliberations of the board and voted to discharge the superintendent. This multiple role of investigator, witness, and decisionmaker raised serious questions of impartiality, and the board member was disqualified.[51]

In one private case,[52] the board minutes clearly reflected that the board had overstepped its proper role in a tenure proceeding. The board had acted to bring the charges against the teacher and then continued its participation as the finder of fact and decision maker. This conduct was inherently improper; the Commission disqualified the entire board.

Once the decision has been made to proceed on the charges, board members should not discuss the evidence with the charging party. A teacher has a right to have his case decided on the basis of the evidence as it is established at the hearing. When a school board is the trier of facts, all parties, counsel, and witnesses must refrain from engaging in private communications with the board regarding the case. A school board's deliberations, like those of a jury, should be free from influence of any kind. Information obtained by board members outside the record and not known to the teacher denies the due-process right to confront and cross-examine those who offered the information. Such extra-record considerations are inherently prejudicial.

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[48] Crampton v. Department of State, 395 Mich. 347, 351, 235 N.W.2d 352, 354 (1975).

[49] TTC 74-3.

[50] TTC 83-21.

[51] Kachaterian v. Taylor Public Schs., TTC 77-22.

[52] TTC 81-47.

Partiality claims can be reduced by appointing an attorney mutually acceptable to the teacher and the board of education to preside over and conduct the hearing. Although this practice adds to the cost of the hearing, it has obvious advantages, particularly if the school board president or one of the trustees is not an attorney.

Use of Attorneys and Advisers in the Hearing

A school board acts as a quasi-judicial administrative agency when it convenes a hearing pursuant to Article IV of the Tenure Act. A board may employ legal counsel to advise and assist in the conduct of these proceedings.The employment of qualified legal counsel generally facilitates the propriety and fairness of the hearing.[53]

The board should avoid commingling the prosecuting and ajudicating functions of attorneys and administrators. A board may employ separate attorneys to assist the charging party (who is usually an administrator) in the preparation of the charges,[54] to serve as hearing officer to conduct the hearing,[55] and to advise the board. Issues arise as to the potential conflict that might prejudice the proceedings if the same attorney serves in more than one of these roles. Within reasonable limits, controlling boards are permitted, but not encouraged, to use one attorney in two roles. It has been held that prejudice will be presumed without actual proof only if a dual-role attorney engages in conduct that is so unexceptable to notions of fundamental fair play.

In *Arnold v. Crestwood Board of Education*,[56] the Court described acceptable conduct of counsel that met its approval:

> Throughout the hearings, the board's counsel called witnesses, conducted direct examination, cross-examined witnesses called by the teachers, and interposed objections to evidence profferred by the teachers' counsel. They also advised the board, both publicly and privately, with respect to rulings on evidence, hearing procedures, and the board's duties generally.[57]

The Court recommended to school boards "that only if evidence of prejudice or bias clearly appears on the record will participation of counsel in a dual role constitute a violation of due process."[58]

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[53] Maciak v. Center Line Public Schs., TTC 78-18; Brueck v. Lincoln Park Bd. of Educ., TTC 67-4.

[54] Barcheski v. Grand Rapids Public Schs., TTC 82-47; Harding v. Bedford Public Schs., TTC 75-5-R.

[55] Peters v. Dearborn Heights Sch. Dist. No. 7, TTC 78-20; Maciak v. Centerline Pub. Schs., TTC 78-18; Reggio v. Anchor Bay Bd. of Educ., TTC 76-46.

[56] Trowt v. Beecher Sch. Dist., TTC 80-27; Mabry v. Wyoming Public Schs., TTC 79-30.

[57] 87 Mich. App. 625, 637, 277 N.W.2d 158, 164 (1978).

[58] Id. at 652, 277 N.W.2d at 171.

In *Niemi v. Kearsley Board of Education*,[59] the Court found no improper conduct on the part of an attorney who regularly served as the board's counsel, advised the board on procedural matters during a tenure hearing, and presented charges against the teacher. The Court stated:

> We recognize that an attorney's dual role carries with it the potential for prejudice and find that the better practice is to appoint an independent attorney to represent the charging party at the dismissal hearing. We decline, however, to adopt a per se rule that would require reversal whenever an attorney performs both functions.[60]

The Court also took note of the fact that if the teacher's due-process rights had been violated at the board hearing, corrections could be made at the Commission level. The Court stated:

> We also observe that plaintiff sought and received a *de novo* review before the Tenure Commission. At these hearings, plaintiff took full advantage of his opportunity to present additional testimony.Had the hearing before the school board denied plaintiff his right to due process, the Tenure Commission hearing would have fully protected plaintiff's rights.[61]

Additional principles on the use of attorneys include: 1) it is not an error for the board to select for its hearing officer an attorney who limits his practice to representing only school boards or charging parties at tenure proceedings;[62] 2) it is not improper for the board's hearing officer to question witnesses during the hearing[63] or dispose of procedural or evidentiary matters;[64] 3) an attorney/client relationship between a controlling board and its hearing officer is not sufficient basis for presuming bias;[65] 4) in a case where the attorney who prepared the charges and also served as the hearing officer for the board, the Court required that actual bias or prejudice must be shown in order to establish a violation of due process;[66] 5) the employment of the same attorney to represent the school board and the charging party in a tenure hearing is not necessarily improper;[67] and 6) it is not necessarily improper for the board's hearing officer and the charging party's attorney to be partners in the same law firm.[68]

In most instances, the remedy for improper use of attorneys and advisers is to order corrective action and not automatic reinstatement. However, where the error is so substantial and so inherently prejudiced that the validity of the proceedings will be forever tainted, reinstatement will be ordered.[69] It is not necessarily improper for the board's hearing officer and charging party's attorney to be partners in the same law firm.[70]

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[59] 103 Mich. App. 818, 303 N.W.2d 905 (1981).

[60] Id. at 821-22, 303 N.W.2d at 907.

[61] Id. at 823-24, 303 N.W.2d at 908.

[62] Harding v. Bedford Public Schs., TTC 82-47.

[63] Private Case 84-28.

[64] Trowt v. Beecher Sch. Dist., TTC 80-27; Visser v. AuCres-Sims Sch. Dist., TTC 80-18.

[65] Private Case, TTC 84-28.

[66] Cooper v. Oak Park Sch. Dist., TTC 80-15; Duva v. Algonac Bd. of Educ., TTC 80-24.

[67] Rogers v. Bd. of Educ., 61 Mich. App. 682, 233 N.W.2d 141; Heemstra v. Bay City Sch. Dist., TTC 73-61; Moulder v. Buchanan Bd. of Educ., TTC 74-45.

[68] Henderson v. Memphis Community Schs., TTC 71-17-2-R; Wujkowski v. Essexville-Hampton Public Schs., TTC 79-37.

Burden of Proof and Evidence

The school district is required to produce evidence at tenure hearings and the burden of proving unfitness rests with the controlling board. The school district must show reasonable and just cause for demoting or discharging the teacher. The evidence presented at the hearing must be confined to the charges in the notice or to amended charges properly filed and served; evidence regarding matters not included in the notice cannot be presented. A teacher cannot be dismissed or demoted on allegations not included in the original or amended notice.[71]

Witnesses

The controlling board has the power to subpoena witnesses on its own motion or at the request of the teacher. If a witness refuses to appear, the controlling board may petition the county circuit court to issue its subpoena. Failure to obey the court subpoena may result in a contempt citation.[72] The hearing gives the teacher the opportunity to cross-examine the school district's witnesses and produce his own witnesses. A refusal to grant a teacher's request to subpoena a witness constitutes a denial of due process and violates the Teachers' Tenure Act. Requests to the controlling board of education for subpoenas to enable a teacher to present his case should be liberally granted.

In *Pounder v. Harper Woods Board of Education*,[73] the school board refused[74] to honor the teacher's request to subpoena a doctor who, at the request and direction of the board, had examined the teacher and submitted a written medical evaluation to the board. The doctor's report was considered by the board in rendering its decision and his information was crucial to the resolution of the case. Introduction of the report without an opportunity to cross-examine the physician was an error. To cure the error the matter was remanded to the board with directions to subpoena the physician.[75]

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[69] Mabry v. Wyoming Public Schs., TTC 79-30.

[70] Private Case, TTC 84-28.

[71] Sutherby v. Gobles Bd. of Educ., 73 Mich. App. 506, 252 N.W.2d 503 (1977); Beebee v. Haslett Bd. of Educ., 66 Mich. App. 718, 239 N.W.2d 724 (1976); Luther v. Alpena Bd. of Educ., 62 Mich. App. 32, 233 N.W.2d 173 (1975); Rumph v. Wayne Community Sch. Dist., 31 Mich. App. 555, 188 N.W.2d 71 (1971).

[72] Pounder v. Harper Woods Bd. of Educ., TTC 74-5.

[73] TTC 74-5.

[74] Upon the teacher's first request to subpoena the doctor, the board complied. When he failed to appear at the hearing, the board admitted the physician's written evaluation into evidence over the objection of the teacher. The board then refused to honor the teacher's request to require the doctor to appear at the hearing and testify, an action that violated the Tenure Act.

[75] Pounder v. Harper Woods Bd. of Educ., 72 Mich. App. 717, 250 N.W.2d 504 (1976).

Transcript

The Tenure Act requires that "[t]he controlling board shall employ a stenographer who shall make a full record of the proceedings of such hearing and who shall, within ten days after the conclusion thereof, furnish the controlling board and the teacher affected thereby with a copy of the transcript of such record, which shall be certified to be complete and correct."[76] The transcript should also include copies of exhibits introduced at the hearing.[77]

The exact meaning of the transcript requirement has been carefully defined in *Davis v. Board of Education of River Rouge*.[78] Without the benefit of a certified transcript and complete record including references to and copies of exhibits, the teacher cannot prepare a complete and effective appeal.[79] However, if exhibits were exchanged when they were introduced at the hearing, it is not necessary to include them with the transcript also.[80]

Board members who were absent from part or all of the hearing are required to read the transcript before rendering a decision on the charges.Board members who were present at the entire hearing are not required to review the transcript before the decision is made; however, this review may be advisable.[81]

The Commission has held that "a decision of a board of education to discharge a tenure teacher is not valid unless board members, whose votes constitute the decision, have fully evaluated and deliberated on the entire evidence introduced at the tenure hearing."[82] When two of the four board members who voted to discharge a teacher were absent from part of the hearing and did not read the transcript, the Commission stated, "[I]f the trier of fact neither hears the evidence first hand or reads a record made up of such evidence, we can only speculate on what basis a decision was reached."[83]

A delay in delivering the transcript unfairly penalizes the teacher. The transcript must be served within ten days of the conclusion of the hearing, not within ten days of the issuance of the board's decision.[84] The Court reasoned that since the Tenure Act gives a teacher thirty days from the date of the school board's decision in which to appeal to the Tenure Commission, the thirty-day appeal period might in effect be decreased to twenty days if the statute was interpreted so that ten days can elapse after the decision before the transcript need be provided.

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[76] MCLA 38.104(e), MSA 15.2004(e).

[77] Williams v. State Highway Dept., 44 Mich. App. 51, 205 N.W.2d 200 (1972).

[78] 97 Mich. App. 358, 251 N.W.2d 585 (1977).

[79] Smith v. Brandon Sch. Dist., TTC 73-57. The Commission has held that failure to provide all exhibits was not a fatal error requiring reinstatement. Beyer v. St. Ignace Sch. Dist., TTC 77-17; Cameron v. Algonac Community Schs., TTC 77-25; Sprik v. Grandville Public Schs., TTC 74-40-2-R.

[80] Reggio v. Anchor Bd. of Educ., TTC 76-46.

[81] Jessup v. Sandusky Bd. of Educ., TTC 77-32.

[82] Smith v. Brandon Sch. Dist., TTC 73-57 at 2.

[83] Id.

[84] MCLA 38.104, MSA 2004.

The Tenure Act does not indicate what happens if the board fails to furnish the teacher with a copy of the hearing transcript within ten days of the hearing as required. The Tenure Commission had held that failure to provide the transcript within the ten days was a fatal error, and it ordered reinstatement.[85] However, the Supreme Court reversed,[86] holding that the proper remedy was not reinstatement, but rather a tolling of the period for an appeal. But the Court stated: "We do not believe the Legislature intended to provide for automatic reinstatement of a teacher who may be unfit and who has not been prejudiced by the delay in furnishing a transcript."[87]

Rendering the Decision

In making its decision after a hearing, the board of education must follow proper procedures. These are described below.

Use of Attorneys and Advisers in Deliberation

A board of education sits as a jury when it deliberates on the merits of a tenure proceeding.[88] The Commission uses this jury analogy to prohibit the presence of the charging party or the charging party's counsel during the board's deliberations. A school board may rely on subordinates to sift and analyze evidence and may rely upon a subordinate's report and recommendation in reaching a decision. But the subordinate should not have been the charging party, assisted the charging party, or served as a witness. The board is permitted to have the assistance and advice of its agents or staff in reaching a decision, as long as persons who have investigated or prosecuted the case are not consulted.[89]

In *Jensen v. Ludington Public Schools*,[90] the Commission held that prejudice may be presumed in certain circumstances, such as participation by the charging party or his attorney in the deliberations of the local board or participation by an administrator "identified" with the charging party. It would be improper for the attorney who represented the charging party in the preparation of the charges and at the hearing to be involved in any way with the board's private deliberations on the merits of the case.

It is not improper for the board to permit its school attorney or the attorney it has appointed as hearing officer to be present during its deliberations or to assist in the drafting of the decision. Nor is it improper to permit administrators who have not had a relationship with the matter to be present during the board's deliberations. However, the Commission found error and a presumption of prejudice when an administrator who had sat with the charging party during the course of the hearing and testified before the board on the merits of the case also attended the board's deliberations. The Commission ruled that although actual impropriety had not been established nor actual participation in any way been shown, their presence nonetheless was found to be a violation of due process.[91]

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[85] Davis v. River Rouge Bd. of Educ., TTC 74-1, *aff'd*, 73 Mich. App. 358, 251 N.W.2d 585 (1977), *rev'd* 406 Mich. 486, 280 N.W.2d 453 (1979).

[86] Davis v. River Rouge Bd. of Educ., 406 Mich. 486, 280 N.W.2d (1979).

[87] Id. at 490, 280 N.W.2d at 454. In Pounder v. Harper Woods Bd. of Educ., 72 Mich. App. 717, 725, 250 N.W.2d 504 (1975) the Court held that reinstatement for procedural error and invalidation of a discharge is not mandatory unless there is a very substantial blatant defect in the procedure.

[88] Sprik v. Grandville Public Schs., TTC 74-40-2-R; Mabry v. Wyoming Public Schs., TTC 79-30.

[89] Duva v. Algonac Bd. of Educ., TTC 80-24.

[90] TTC 82-63; *accord*, Morgan v. Galesburg-Augusta Community Schs., TTC 85-11; Mabr

It is proper for the school board attorney or administrators to attend the board's deliberations, provided they have not participated in the drafting of the charges or represented the charging party at the hearing.[92]

If the board has requested one of attorneys employed in a dual role to prepare a proposed decision to consider while it deliberates, basic fairness requires that the teacher be offered the same opportunity.[93]

The board of education must make its decision in conformity with the requirements of law.[94] If the teacher requested a public hearing, the decision must be rendered at a public meeting. If a private hearing was requested, the decision must be private. The Tenure Act requires that a written decision must be rendered within fifteen days after the termination of the hearing before the controlling board. The board then has five days to furnish the teacher with a copy of the decision.[95]

The board must consider and render a decision on each charge. It is not necessary to find that every charge has been sustained in order to approve a demotion or discharge. A board need not state the reasons for its decision, findings of fact, or conclusions of law.[96] Its decision is legally sufficient if it delineates which charges it finds established by the evidence presented, that the teacher's conduct caused adverse effect, and that the proven charges constitute reasonable and just cause for the disciplinary action.[97]

The remedy for failure to comply with these requirements is remand to the board for reconsideration and supplementation of the written decision.

Several decisions have held that the teacher has thirty days from the date of the school board's decision to appeal to the Tenure Commission.[98] The thirty-day appeal period runs from the date of the decision, not from the date on which the copy of the decision was furnished to the teacher.[99] However, an unpublished Circuit Court decision holds that the appeal period does not commence until the teacher actually receives the decision.

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[91] Spirk v. Grandville Public Schs., TTC 74-40-2-R.

[92] Harding v. Bedford Public Schs., TTC 80-47; Duva v. Algonac Bd. of Educ., TTC 80-24; Sprik v. Grandville Public Schs., TTC 79-30.

[93] Mabry v. Wyoming Public Schs., TTC 70-30.

[94] In Ethridge v. Westwood Community Schs. Dist., TTC 77-39; the board voted by telephone poll; a formal meeting had not taken place. The Commission held that the action taken was improper.

[95] MCLA 38.104(f), MSA 15.2004(f).

[96] Jessup v. Sandusky Bd. of Educ., TTC 77-32.

[97] Knox-Brown v. Benton Harbor Schs., TTC 79-41; Wujkowski v. Essville-Hamption Public Schs., TTC 79-37; Henderson Cummunity Schs., TTC 71-17-2-R.

[98] MCLA 38.121, MSA 14.3021.

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[99] Morrow v. Monroe Public Schs., TTC 79-5; Tremonti v. Warren Woods Public Schs., TTC 71-31; 1969-70, pt. 1, p. 111, OAG No. 3372 (June 9, 1959).

CHAPTER X

Appeal Rights of Tenured Teachers

Tenured teachers are granted a statutory right to appeal tenure-related matters to the Commission.[1]

Time Limitations for Appeal

For a period of time the Tenure Commission held that appeals must be made within thirty days of date of the local board's decision.[2] Recently, however, it has been held that the appeal must be made within thirty days from the date the teacher receives notice of that decision.[3] The appeal period is limited to a short time so that the appeal will be disposed of when the evidence is fresh. This limitation is applied very rigorously; the Tenure Commission. The Tenure Commission will not allow a teacher the right to an appeal if he fails to comply with the thirty-day limit.

Conditions That Toll the Appeal Period

The thirty-day appeal period does not begin to run until the procedural requirements of the Tenure Act at the school board level have been followed.[4] A teacher's failure to make a timely appeal will not bar a hearing before the Tenure Commission if the board's procedures were not in accordance with the provisions of the Tenure Act. For example, when a board of education failed to present charges against a teacher and send a statement of his rights as required by the Act, the Court stated:

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[1] MCLA 38.121, MSA 15.2021."A teacher who has achieved tenure status may appeal any decision of a controlling board under this act within 30 days from the date of such decision, to a state tenure commission."

[2] Halliburton v. Sch. Dist. Detroit, TTC 79-1; Curry v. Huron Valley Schs., TTC 73-59; Tremonti v. Warren Woods Public Schs., TTC 71-31; 1959-60, pt. 1, p. 111, OAG No. 3372 (June 9, 1959). The Tenure Commission had adopted the following rule: "R.38.143 Initiation of Appeal. Rule 13. An appeal from a decision of a controlling board under the Act shall be initiated within 30 days from the *date of receipt* of such decision by the appealing party or the attorney of the appealing party by filing a notice of appeal and petition, original and 6 copies, with the commission. . . ." (emphasis added). The Commission held that its Rule 38.143 exceeded its statutory authority and rescinded it. The appeal date begins to run from the *date of the decision*. Morrow v. Monroe Public Schs., TTC 79-5.

[3] Tomiak v. Hamtramck Sch. Dist., 138 Mich. App. 644, 360 N.W.2d 257 (1984); Goodwin v. Kalamazoo Sch. Dist. Bd. of Educ., 82 Mich. App. 559, 267 N.W.2d 142 (1978); Biberstine v. Port Austin Public Sch. Dist. /9, 51 Mich. App. 274, 214 N.W.2d 729 (1974).

[4] Davis v. River Rouge Bd. of Educ., 406 Mich. 486, 280 N.W.2d 453 (1979); Biberstine v. Port Austin Public Sch. Dist. No. 9, 51 Mich. App. 274, 214 N.W.2d 729 (1974); *accord*, Kramer v. Van Dyke Schs., 134 Mich. App. 479, 351 N.W.2d 572 (1984); Shippey v. Madison Sch. Dist., 55 Mich. App. 663, 223 N.W.2d 116 (1974).

> We hold . . . . that where, as here, a board of education attempts to discharge a tenure teacher without fully complying with the provisions of the teachers' tenure act, the 30-day limitation in which the teacher has to appeal to the State Tenure Commission is tolled until such time as the school board makes its decision in accordance with the teachers' tenure act.[5]

Thus, the appeal period is tolled when the school board's written notice does not sufficiently inform the teacher of the action and afford him an opportunity to present objections.[6] The tolling doctrine effectuates the purposes of the Tenure Act by ensuring access to an impartial review of a school board's employment decisions.[7]

In concluding that the thirty-day period was tolled unless a teacher is given proper notification of his rights, the Court in *Biberstine v. Port Austin School District No. 9* was concerned that teachers will not have knowledge of this very limited thirty-day appeal period. The Court stated that "[i]n light of the board's failure to notify the plaintiff of his rights under the teachers' tenure act, it is not unlikely that plaintiff was unaware of his right to appeal to the State Tenure Commission."[8]

The fact that a teacher had actual knowledge of the provisions of the Tenure Act from another source does not mean that the notice requirement has been met.[9] Nor is the fact that the teacher has retained legal counsel enough to meet the board's obligation to provide the right of appeal.[10]

In a layoff situation—that is, where a teacher's services are being terminated because his position is being eliminated—it is not necessary to give notice, list charges, and allow for a school board hearing.[11] However, the thirty-day statute of limitations for appeals to the Tenure Commission is tolled until the controlling board has provided the laid-off teacher[12] with a statment of his rights under the Tenure Act.[13] The Court of Appeals has stated that: "[t]o allow a board to discharge on the pretext of economic necessity, not inform the teacher of appeal rights and then hold the teacher to the 30-day limit would allow the board to profit from its own wrong doing."[14]

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[5] Biberstine v. Port Austin Public Sch. Dist. No. 9, 51 Mich. App. 274, 278-279, 214 N.W.2d 729, 732 (1974).

[6] Beymer v. River Rouge Sch. Dist., TTC 82-15.

[7] Kramer v. Van Dyke Public Schs., 134 Mich. App. 479, 351 N.W.2d 572 (1984).

[8] Biberstine v. Port Austin Public Sch. Dist. No. 9, 51 Mich. App. 274, 278, 214 N.W.2d 729, 732 (1974).

[9] Kramer v. Van Dyke Schs., 134 Mich. App. 479, 351 N.W.2d 572 (1984). The Court held that "[a]ctual notice received by a teacher from another source does not excuse a school board's failure to comply with its obligation to provide clear and informative notice." Id. at 488, 351 N.W.2d at 576. See also Graham v. Livonia Public Schs., TTC 79-59; Savel v. Clintondale Community Sch. Dist., TTC 78-48; Lyon v. Wyoming Public Schs., TTC 77-37.

[10] Smith v. Flint Community Schs., TTC 81-32.

[11] Steeby v. Sch. Dist. of Highland Park, 56 Mich. App. 395, 224 N.W.2d 97 (1974).

[12] For an extensive discussion of notice in layoff and recall situations see section "Criteria for Adequate Notice" for Layoff and Recall in Chapter V.

[13] Goodwin v. Kalamazoo Bd. of Educ., 82 Mich. App. 559, 267 N.W.2d 142 (1978).

In *Goodwin v. Kalamazoo Board of Education*, the board argued that it could never know when a teacher might allege that a discharge was a subterfuge, and that a teacher may challenge a termination months or years after it occurs.The Court agreed, but recommended that to forestall any appeals after the thirty-day period, the board should always notify a teacher of the right to appeal a termination, whether the termination is for cause or economic necessity.

Procedures for Appeal

The Tenure Commission is directed by statute to establish rules and regulations for its own internal administration. The statute provides that "[t]he tenure commission shall draw up rules and regulations and shall have the power to amend same and to provide for the conduct of its affairs in such manner as shall be consistent with the provisions of the act."[15] Pursuant to this authority, the Commission has promulgated its Rules of Practice and Procedure.[16] These rules provide the procedures for making an appeal to the Commission.

A question arose as to the effect of the Administrative Procedure Act[17] on the Commission's Rules of Practice and Procedure. In *Henderson v. Memphis Community School District*,[18] the Court of Appeals ruled that the Administrative Procedures Act is applicable only when a particular agency has failed to provide rules and regulations for its conduct. The Commission had ordered reinstatment of a teacher and compensation for salary lost because the controlling board had failed to file its answer with the Commission within the time required.[19] The Court of Appeals held that the legislature had intended to authorize agencies to "promulgate rules, not inconsistent with this act or other applicable statutes, prescribing procedures for contested cases"[20] and that the Administrative Procedures Act did not rescind the Commission's Rules of Practice and Procedures, because the Administrative Procedures Act provides: that "Rules which became effective before July 1, 1970 continue in effect until amended or rescinded."[21] The statutory provisions stated above speak prospectively. The Court stated that "[w]e read them as requiring administrative agencies *not* to hereinafter promulgate inconsistent or contradictory rules."[22]

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[14] 82 Mich. App. at 572, 267 N.W.2d at 148.

[15] MCLA 38.140, MSA 15.2040.

[16] R. 38.131 *et seq*. The current rules rescind and replace former rules R. 38.71 and R.101 to R.123. A complete copy of the rules is in the Appendix.

[17] MCLA 24.201 *et seq*., MSA 3.560(10) *et seq*.

[18] 57 Mich. App. 770, 226 N.W.2d 725 (1975).

[19] Henderson v. Memphis Community Sch. Dist., TTC 71-17. The rule in question was R 38.105 which stated in part that "appellee shall have 15 days within which to file an answer." Rule 38.105 was rescinded and replaced by R. 38.147, which allows for 20 days instead of 15.

[20] MCLA 24.233(3), MSA 3.560(133)(3), cited in Henderson v. Memphis Sch. Dist., 57 Mich. App. 770, 776, 226 N.W.2d 725, 728 (1975).

[21] MCLA 24.231(1), MSA 3.560(131)(1).

[22] Henderson v. Memphis Sch. Dist., 57 Mich. App. 770, 775, 226 N.W.2d 725, 728 (1975).

It was the legislature's intent that if a particular agency fails to provide in its rules and regulations for any type of response or answer to a complaint filed with an agency, the Administrative Procedures Act will be applicable. The Court of Appeals held that the Memphis school district was obliged to follow the Commission's rules, and stated: "If the commission felt that a formal response was required for it to properly perform its responsibilities, we are not normally disposed to lightly set aside an agency finding in view of the great weight which courts accord to the construction given a statute by the involved agency."[23]

The Court of Appeals, however, while conceding that the Commission's rule was mandatory, found that the rule provided no penalty for failure to file; nor did it give broader or more summary power to the Commission in the event of such failure. The extreme interpretation the Commission gave to its own rule was rejected by the Court, since fundamental fairness would require that the non-answering party be apprised of the consequences of failing to file an answer. The Henderson Court opined "that the question of the teacher's right to reinstatement and back pay should be decided on the merits of the case, not on the narrow ground of the late filing of an answer by the school district."[24]

Timeliness of Hearing

The Tenure Act provides that when a tenured teacher appeals a decision of a local controlling board, "[t]he state tenure commission shall provide for a hearing to be held within 60 days from the date of appeal."[25]

The question has arisen as to whether the word "shall" as used in the statute is mandatory to the extent that failure to hold the hearing within the prescribed time limit violates a teacher's statutory or constitutional rights.

For several reasons, the Commission has not been able to comply with the sixty-day statutory requirement. This has been the subject of opinions from the Attorney General,[26] a circuit court,[27] and the Tenure Commission.[28] The thrust of the opinions, which are grounded in the Act's purpose to protect teachers' rights, is that the Tenure Commission's failure to hold a timely hearing will not deprive a teacher of his right to a hearing.

It was argued that if the Tenure Commission fails to hold a hearing within sixty days of the date of appeal, the Commission loses jurisdiction. However, the Attorney General held that a teacher must not be deprived of a hearing because of a delayed hearing date:

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[23] Id. at 777, 226 N.W.2d at 729 (citations omitted).

[24] Id. at 778, 226 N.W.2d at 729.

[25] MCLA 38.121, MSA 15.2021.

[26] 1949-50, p. 256, OAG No. 987 (June 20, 1949).

[27] Michigan Educ. Ass'n v. State Tenure Comm'n, No. 77-203383-AW, Circuit Court, Ingham County (Jan. 10, 1979).

[28] Woodworth v. Lowell Area Schs., TTC 74-3.

> It is our opinion that "shall" used in the last sentence of Section 38.131, C.L. 1948, is mandatory to the extent that it is the duty of the Tenure Commission to provide for a hearing but that time of the hearing is directory, and that having acquired jurisdiction in the appeal due to the timely action of the appellant, the commission did not lost jurisdiction thereafter because of a delayed hearing date. To hold otherwise might result in the abrogation of an appellant teacher's statutory right of appeal which is an integral part of the tenure system of employment.[29]

The Tenure Commission has adopted the Attorney General's opinion as its own[30] and has cited three circuit court opinions[31] supporting its decision.

In *Michigan Education Association v. State Tenure Commission*,[32] the Circuit Court held that the legislature intended the time limit to be strictly adhered to in order to protect teachers' rights. The Court ruled that the Commission must comply with the sixty-day time limit.

The Circuit Court held, however, that before it would issue an order directing the Tenure Commission to hear an appeal within the sixty-day limit, there must have been a prior written demand upon the Commission for such a hearing and no compliance with that demand.

Commission's Subject Matter Jurisdiction

The Commission is limited to hearing appeals that implicate teachers' rights under the Tenure Act.[33] However, if an issue is included in an appeal that is incidental to the tenure question presented, the Commission has the authority to decide whether its has jurisdiction and is not precluded from deciding the non-tenure issue.[34]

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[29] 1949-50, p. 256, OAG 987 (June 20, 1949).The Attorney General did not answer the question of whether a teacher is entitled to a hearing within sixty days. He held that a teacher cannot be deprived of a right to a hearing because of a delayed hearing date.

[30] Woolworth v. Lowell Area Schs., TTC 74-3 (school board requested dismissal of a teacher's appeal because of a delayed hearing).

[31] Sutherby v. Gobles Sch. Dist., No. 74-009-AA, Circuit Court Van Buren County (April 2, 1975); Pounder v. Harper Woods, No. 74-038-083-AA, Circuit Court, Wayne County (Sep. 10, 1975); Cristan v. West Iron County, No. 74-17112-AA, Circuit Court, Ingham County (May 21, 1976); cited as authority in Woolworth v. Lowell Area Schs., TTC 74-3.

[32] No. 77-2038-AW, Circuit Court, Ingham County (Jan. 10, 1979). The Court directed that "an order consistent with this opinion may enter."Id. at 10. The Tenure Commission argued that it was unable to hold hearings within sixty days because of insufficient funds and staff, but the Court did not find the reason to be meritorious. The Circuit Court was well aware of the inability of the Commission to meet the sixty-day time limit for hearings. It acknowledged it had no authority to require the state to spend money to comply with the legislature's intent. No order has yet been issued by the Court directing compliance. The decision has been useful to the Commission in obtaining additional resources. Recently the Commission added a third administrative law examiner and improved its computerized operations.

[33] Imbrunone v. Inkster Public Schs., TTC 81-52 citing Lipka v. Brown City Schs., 403 Mich. 554, 271 N.W.2d 771 (1978)

[34] Viera v. Saginaw Bd. of Educ., 91 Mich. App. 555, 283 N.W.2d 796 (1979); Giessen v. Bd. of Educ., TTC 84-37; Belcovski v. Sch. Dist. Hazel Park, TTC 80-49; Bernardo v. Woodhaven Sch. Dist., TTC 80-34.

Commission Authority and Laws Unrelated to Tenure

The Commission has been asked to determine, when reviewing claims that the tenure rights of teachers have been violated, whether it also has subject matter jurisdiction to consider at the same time the legality of any action taken in contravention of the the terms of a collective bargaining agreement, individual employment contracts, provisions of the school code, and state and federal constitutions. It has been argued that the Commission is empowered to decide "all issues of law and fact" raised by an appeal from a decision of a controlling board. These claims evolved from statements in two court decisions.

In *Viera v. Saginaw Board of Education*,[35] the teacher appealed his discharge for failure to pay an agency shop fee. The Commission upheld the discharge for reasonable and just cause but did not rule on the issue of whether an agency shop fee was legal. Viera then proceeded in court, alleging a breach of contract. The Court of Appeals held that the Commission could have determined whether an agency fee was lawful.[36] For its authority, the Court quoted from a Supreme Court decision:

> [A]n appeal to the commission under said article 6 operates to subject all questions of fact decided by a controlling board, as well as requisite questions of law, to review and determination *de novo* by the commission.[37]

The *Viera* Court concluded:

> Where, as here, the sole reason for plaintiff's dismissal was his failure to comply with an agency shop provision, the question of whether that provision was legal was not outside the scope of the Commission's jurisdiction.[38]

The Commission has never responded directly to the pronouncements of the Court in *Viera*, but it has described its jurisdictional role in numerous decisions.

If a claim is premised solely on a breach of a collective bargaining agreement or an arbitrator's award, and not upon a denial of Tenure Act rights, the Commission is not the proper forum.[39] The locus for remedy for violations of a collective bargaining agreement is the contract grievance procedure. However, a school board cannot be excused from complying with the Tenure Act's requirements when carrying out the provisions of a collective bargaining agreement. If claims of violations of labor agreements also concern rights guaranteed under the Tenure Act, the Commission may determine whether the agreement has been breached.[40]

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[35] TTC 68-14.

[36] Viera v. Saginaw Bd. of Educ., 91 Mich. App. 555, 283 N.W.2d 796 (1979).

[37] Long v. Bd. of Educ., 350 Mich. 324, 325, 86 N.W.2d 275, 276 (1957).

[38] Viera v. Saginaw Bd. of Educ., 91 Mich. App. 555, 560, 283 N.W.2d 796, 798 (1979).

[39] Private Case, TTC 82-65 at 12.

[40] Slocum v. Littlefield Bd. of Educ., 127 Mich. App. 183, 338 N.W.2d 907 (1983); Wilson v. Imlay City Bd. of Educ., TTC 81-61; Branch v. Detroit Bd. of Educ., TTC 80-37; Fortuna v. Detroit City Sch. Dist., TTC 79-57; DeFrain v. River Rouge Sch. Dist., TTC 77-29. In *Slocum* the teacher maintained she was entitled to tenure when she was reinstated pursuant to an arbitrator's award. The Court determined that the Commission had jurisdiction over the question of whether the effect of the arbitration award was to entitle her to teacher tenure.

Claims that are contract violations, however, but which fall short of encompassing Tenure Act rights, are not within the Commission's jurisdiction.

The Commission's jurisdiction in labor disputes was described by the Michigan Supreme Court in *Rockwell v. Crestwood School District*:[41]

> The teacher's tenure act was not intended, either in contemplation or design, to cover labor disputes between school boards and their employees. The 1937 Legislature in enacting the teachers' tenure act could not have anticipated collective bargaining or meant to provide for the resolution of labor relations disputes in public employment. . . .
>
> The State Tenure Commission has no authority to entertain an unfair labor practice charge against a school board. Its jurisdiction and administrative expertise is limited to questions traditionally arising under the teachers' tenure act.[42]

The Tenure Commission has interpreted its authority under *Rockwell* this way: "[W]here the question presented flows out of and is incidental to the tenure questions presented, we are not precluded from deciding the question."[43] On several occasions the Commission has offered the following description of its authority:

> Where the sole basis for a teacher's claim is a violation of the collective bargaining agreement, this Commission lacks jurisdiction. The claim falls within our jurisdiction only where the violation of a collective bargaining agreement is related to rights guaranteed by the Tenure Act . . . . For example, where a teacher makes an allegation of violation of a collective bargaining agreement in support of a bad faith action, we may consider such evidence as properly bearing on our review of the propriety of the board's action.[44]
>
> While PERA has been recognized as the pre-eminent law in the area of public employment in Michigan, we do not believe that this principle negates our jurisdiction any time there is a conflict between the provisions of a collective bargaining agreement negotiated under PERA and the statutory rights embodied in the Tenure Act.Our jurisdiction is lost only when there is a positive repugnancy between the language of PERA and the Tenure Act or where the controversy rests entirely on a determination of contractually created rights.[45]
>
> [T]he enactment of PERA did not extinguish our authority to weigh the impact of contractual provisions against the rights guaranteed to teachers under the Act, nor does PERA subject those statutory rights to the "vagaries of contract negotiations."[46]

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[41] 393 Mich 616, 227 N.W.2d 736 (1975).

[42] Id. at 630, 227 N.W.2d at 741-42.

[43] Belcovski v. Sch. Dist. of Hazel Park, TTC 80-49 at 8.

[44] Simpson v. Roseville Community Schs., TTC 82-72 at 6.

[45] Goodrich v. Mt. Morris Consolidated Schs., TTC 83-5 at 5.

[46] Six v. Muskegon Sch. Dist., TTC 81-17 at 10. Other decisions where the Commission clarified its authority are: Shannon v. Michigan Center Sch. Dist., TTC 84-39; Private Case, TTC 84-37; Bernardo v. Woodhaven Bd. of Educ., TTC 84-34; Albrecht v. Harper Creek Community Schs., TTC 83-66 and 83-67; Lee v. Garden City Sch. Dist., TTC 82-87 and 82-88; Private Case, TTC 82-65; Jensen v. Ludington Area Sch. Dist., TTC 82-63; Starrs v. Linden Community Schs., 82-33 and 82-54; Thorsen v. Carrollton Public Schs., TTC 81-76; Clifton v. Warren Consolidated Schs., TTC 81-41; Brzak and Gee v. Huron Valley Schs., TTC 81-12; Marentette v. Roseville Sch. Dist., TTC 80-6; Arnold v. New Haven Community Schs., TTC 79-11.

Collective Bargaining Agreements

The Tenure Commission does not have the authority to evaluate a school district's personnel policies. However, a controlling board's use of a collective bargaining agreement to set out its personnel policies does not deprive the Commission of its power to consider claims arising from the board's implementation of the agreement when tenure rights are implicated. The Commission may, within this limitation, consider evidence of contract violation in evaluating the arbitrariness or good faith of a board's action in applying its personnel policies. The test is whether the alleged violations of a governing policy or rule were prejudical to the teacher's tenure rights. This test has been applied in several decisions.

A. Negotiated Layoff and Recall Qualifications

School boards and teacher organizations often incorporate negotiated qualification standards for layoff and recall purposes in collective bargaining agreements. It has been asked whether the Commission has jurisdiction when teachers allege that the board has failed to follow the negotiated standards. The Commission has ruled that if a negotiated qualification standard is neither arbitrary nor otherwise violative of the Act, claims of failure to apply that standard are reviewable by the Commission.[47] In *Marentette v. Roseville School District*, the appellants asserted that unqualified teachers were retained in positions for which the appellants were certified and qualified. Qualification standards for layoff and recall purposes had been incorporated into a collective bargaining agreement. The Commission ruled that it had authority to review the board's decisions regarding the application of those standards.[48]

A contract violation and might also be arbitrary and capricious conduct that violates the Act. This principle was stated by the Commission:

> [I]n situations involving termination of services due to a necessary reduction in personnel we must look primarily to the purpose of the Act to determine whether a controlling board's actions comport with the Act. In these cases the standard is whether the board acted arbitrarily or capriciously or pursuant to a bona fide reason.[49]

In *Thorsen v. Carrollton Schools*, the Commission stated:

> Where . . . . a teacher makes an allegation of violation of a collective bargaining agreement or an arbitrator's award in support of a claim of bad faith action, we may consider such evidence as properly bearing on our review of the propriety of the board's action.[50]

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[47] Marentette v. Roseville Sch. Dist., TTC 80-6; *accord—: Brzak v. Huron Valley Schs., TTC 81-12; Starrs v. Linden Community Schs., TTC 82-33 and 82-54.*

[48] *Id. Accord*, Albrecht v. Harper Creek Public Schs., TTC 83-66 and 83-67; Thorsen v. Bd. of Educ. Carrollton Public Schs., TTC 81-76; Belcovski v. Hazel Park Public Schs., TTC 80-49.

[49] Bernardo v. Woodhaven Sch. Dist., TTC 80-34 at 4.

[50] TTC 81-76 at 5.

B. Waiving Administrative Tenure

In *Belcovski v. School District of Hazel Park*,[51] the board argued that a provision in the collective bargaining agreement excluded administrative tenure. In asserting its jurisdiction, the Commission stated that "where the question presented flows out of and is incidental to the tenure questions presented, we are not precluded from deciding the question."[52]

In *Clifton v. Warren Consolidated Schools*,[53] the appellant asserted that he had attained administrative tenure by virtue of a provision in a collective bargaining agreement. The board argued that the Commission lacked jurisdiction because Clifton's claim was really an issue of unfair labor practice. In rejecting the board's assertion, the Commission stated that "because appellant's claim in the instant situation rests on his right to administrative tenure under the Tenure Act, we have jurisdiction to consider the effect of the collective bargaining agreement in question and any amendment thereto."[54] The Commission ruled that the waiver of tenure in the collective bargaining agreement was applicable to Clifton.

C. Examples of Commission Lack of Jurisdiction

In *Defrain v. River Rouge School District*,[55] the Commission was asked to consider whether a method of computing seniority was a proper subject for its review. Seniority rights are created by the collective bargaining agreement.Disputes over the manner and method of calculating seniority must be resolved by reference to the terms of the collective bargaining agreement and not by reference to the Teachers' Tenure Act.

In *Simpson v. Roseville Community Schools*,[56] the teacher claimed that the board had a duty, pursuant to the Tenure Act and the collective bargaining agreement, to transfer teachers in order to provide employment for more senior teachers facing layoff. The Commission had previously held that the Tenure Act does not impose any affirmative obligation on controlling boards to rearrange teaching assignments in order to facilitate the recall of a laid-off tenured teacher.[57] Thus, the Board had no obligation under the Tenure Act to make transfers. Simpson argued, however, that the board had violated the collective bargaining agreement by failing to make the transfers. The Commission held that because the alleged violation of the collective bargaining agreement was unrelated to any of Simpson's rights under the Tenure Act the Commission's jurisdiction could not be invoked.

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[51] TTC 80-49.

[52] Id. at 8.The Commission determined that the waiver of administrative tenure was not applicable to Belcovski because he was not in the bargaining unit covered by the contract.

[53] TTC 81-41.

[54] Id. at 5.

[55] TTC 83-5 at 5. *accord*, Wilson v. Imlay City Bd. of Educ., TTC 81-61.

[56] TTC 82-72.

[57] Wogerman v. Branch Intermediate Sch. Dist., TTC 81-42.

In *Even v. Crestwood School District*,[58] the teacher alleged that the failure of the board to appoint him to "extra-duty" assignments of head football coach and head baseball coach violated both the Tenure Act and his rights under the collective bargaining agreement. The Commission ruled that extra-duty assignments are not within the jurisdiction of the Commission. The Commission had previously ruled in, *Six v. Muskegon Public Schools*,[59] that "the legislature intended to remove extra duty assignments from the force of the Tenure Act altogether." In *Even* the Commission stated:

> In the instant situation we have already concluded that appellant Even's claim to an extra duty assignment does not come within the purview of the Commission. Since the alleged wrongful conduct of the board in refusing to hire appellant for the coaching position positions does not, thus affect appellant's rights under the Tenure Act, the alleged violation of the contract is, therefore, insufficient to invoke the jurisdiction of this Commission.[60]

In *Fortuna v. Detroit City School District*,[61] the teacher alleged that the building principal had unilaterally changed the grades of his students in contravention of the provisions of the collective bargaining agreement. Fortuna made no claim that he was discharged, demoted, improperly laid off due to a bogus necessary reduction in personnel, or denied recall or reemployment following a leave of absence. His claim was premised solely on a breach of the collective bargaining agreement, and Tenure Act rights were not implicated.The Commission lacked jurisdiction to hear the matter.

In *Krenkel v. Jackson Public Schools*, the Commission determined that it did not have the authority to resolve a dispute regarding the implementation of an affirmative action program. The board of education had laid off teachers pursuant to a negotiated affirmative action plan and retained less-senior or probationary minority teachers in positions that the appellants should have held. The laid-off teachers alleged that the affirmative action provision in the collective bargaining agreement was unlawful, as it constituted an impermissible waiver of tenure rights by contract. In denying its own jurisdiction the Commission stated:

> The Tenure Act was enacted to improve education by maintaining an adequate and competent teaching staff and by retaining teachers who have demonstrated their fitness. The concept of affirmative action is a creation of the 1960's. Such a notion could not have been contemplated by the legislature in enacting the Tenure Act in 1937. Accordingly, just as with labor disputes, the Tenure was not designed to pass upon the wisdom of affirmative action plans . . . . We must conclude that our authority to resolve the instant dispute is equally lacking.[62]

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[58] TTC 81-60.

[59] TTC 81-17 at 13.

[60] Even v. Crestwood Sch. Dist., TTC 81-60 at 5.

[61] TTC 79-57.

[62] TTC 81-24 at 4-5 (citations omitted).

When Tenure Claims Have Been Adjudicated in Another Forum

A teacher has available multiple forums for redress of grievances.[63] It has been asked whether the fact that a decision was already made in another forum prevents the Commission from assuming jurisdiction.

It is well established that *res judicata*[64] or collateral estoppel[65] would bar an action if the issue had been litigated in an earlier action. The purpose of this judicially formulated policy is to prevent the re-litigation of issues between the same parties.[66]

The question has arisen whether the Commission's jurisdiction is barred by *res judicata* or collateral estoppel when a dispute that implicates Tenure Act rights is submitted to arbitration and the grievance is dismissed. When teachers have lost similar claims in arbitration and appeal to the Commission, the doctrine of *res judicata* is not applicable. For example, in *Marentette v. Roseville School District*,[67] the appellants had pressed their grievances over their layoffs through the arbitration stage, and the grievances had been denied. The district argued, on the basis of *res judicata*, that the arbitration award prohibited the Commission's jurisdiction. The Commission determined that it did have jurisdiction because no violation of the Tenure Act had been raised before the arbitrator. The Commission also questioned whether an arbitrator could ever decide a tenure claim, because an arbitrator's jurisdiction is limited to the confines of the contract.

In *Jensen v. Ludington Area School District*,[68] a tenured teacher was discharged after a hearing before the controlling board. Relying upon a provision in the collective bargaining agreement, she invoked her right to arbitration. The arbitrator denied the grievance. The teacher then appealed to the Commission. The board argued that the teacher was barred by *res judicata* from challenging her discharge and attacking the arbitrator's decision before the Commission.

In rejecting the board's claims, the Commission stated that "no Michigan court has held that the arbitral forum provided by many collective bargaining agreements as a matter of mutual agreement can divest this statutory forum of its prerogative, or obligation, to adjudicate statutory claims."[69] The Commission held that the issues in arbitration and before the Commission were not identical, for three reasons: *First*, the "reasonable and just cause standards" that apply to a decision under the Tenure Act are not necessarily the same as those used by an arbitrator. *Second*, the arbitrator is not required to proceed in accordance with the Michigan Administrative Procedures Act. And, *third*, his decision is not subject to judicial review on its merits, in most instances. The Commission concluded by stating that "we cannot be bound by the findings of a private arbitrator on a matter of statutory right wherein we are authorized to make *de novo* findings."[70]

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[63] A teacher may assert a claim for breach of contract apart from any remedy provided by the Teachers' Tenure Act. Bruinsma v. Wyoming Public Schs., 38 Mich. App. 745; 197 N.W.2d 95 (1972); Shippey v. Madison Public Schs., 55 Mich. App. 663, 223 N.W.2d 116 (1974).

[64] *Res judicata* can be defined as: "a judgment, to constitute a bar to a claim in a subsequent action, must be rendered upon the merits, upon the same matter in issue, and between the same parties or their privies." Curry v. City of Detroit, 394 Mich 327, 331, 231 N.W.2d 57, 58-9 (1975).

[65] Collateral estoppel has been defined as follows: "Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action." Senior Accountants v. City of Detroit, 399 Mich. 449, 458, 249 N.W.2d 121, 125 (1976).

[66] 56 Harv. L. Rev. 7 (1942).

[67] TTC 80-6.

[68] TTC 82-63.

[69] Id. at 9.

In *Beymer v. River Rouge School District*,[71] an arbitrator had held that a teacher was not qualified for a position. When the teacher initiated an appeal to the Tenure Commission, the board argued that this was barred by *res judicata*. In asserting its authority to review the matter, the Commission ruled that the arbitration involved claims that had to do with contract rights. Nor was there any showing that the arbitrator was empowered to decide any matters other than those arising from the collective bargaining agreement.

The three decisions discussed above make it abundantly clear that even if a controlling board is successful in arbitration, it may still be required to defend before the Commission. Recognizing this problem, one district, faced with concurrent arbitration and Tenure Commission hearings, sought to defer the arbitration and proceed to the Tenure Commission.[72] The district reasoned that even if it won the arbitration the matter would still come before the Commission and the district wanted to limit potential back pay awards. The Commission decided to grant a deferral to arbitration, but required the decision to be rendered within sixty days. The Commission stated its criteria for deferral to arbitration.:

> [A] request for deferral will be entertained only when, at a minimum, three essential factors are present. First, the grievance must have proceeded to arbitration prior to our hearing or consideration of the merits of the tenure matter. Second, the arbitration proceedings must embrace substantially identical questions of law and fact as those presented here. Third, the relief contemplated in the arbitration proceedings must include the relief requested in the tenure appeal. While we find all of these factors present here, we are not convinced that satisfaction of these criteria warrants the grant of a deferral for an indeterminate length of time.[73]

Tenure Act and Agency Shop Fee

The Tenure Commission has been asked to rule on the question of whether a board of education, pursuant to a collective bargaining agreement "agency shop service fee"[74] clause, may discharge a teacher under the Tenure Act's reasonable and just cause provision.[75] An example of such a clause might be:

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[70] Id. at 8.

[71] TTC 82-51.

[72] Eldred v. Niles Community Schs., TTC 79-15.

[73] Id. at 4.

> In the event that a teacher shall not pay the agency shop service fee directly to the Association or authorize payment through payroll deductions, the Board shall, when notified by the Association, cause the termination of employment of such teacher at the close of the semester.

The Commission deadlocked on a two-two vote on the first two decisions[76] and affirmed dismissal on the third.[77] The latter was appealed to the Circuit Court, which reversed, holding that an agency shop service fee provision was impermissible because it had never been authorized by the legislature.[78] This reversal was affirmed by the Michigan Supreme Court.[79] As a consequence of the courts' decisions, the Michigan Legislature amended the Public Employees' Relations Act (PERA) to authorize agency shop agreements[80] that require as a condition of employment that all non-union employees in the bargaining unit pay agency shop fees. Later, the constitutionality of an agency shop service fee was sustained by the U. S. Supreme Court.[81] Subsequent to the PERA amendment and the Supreme Court decision, the Tenure Commission was again requested to rule on the "agency shop service fee/reasonable and just cause" question.[82] The Commission reinstated the teacher in this case, holding that refusal of a teacher to pay the agency shop fee had no connection with the teacher's job performance. The Commission stated:

> The charges in the instant case had no relation to the Appellant's teaching abilities and/or her conduct in, or out of, the classroom and the resulting effects on her students or the school system. No evidence was presented to this Commission regarding the harmful effect such a failure to pay union fees or dues would have either on the students of Appellant or on the school system.[83]

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[74] An agency shop agreement requiring the payment of agency service fees is a particular type of union security device. Such agreements provide that all employees represented by a union, regardless of whether they are union members, must pay a service fee to the union. Non-union member fees are equivalent to the cost of negotiating and administering the collective bargaining agreement. Failure of an agency shop member to pay the fee or authorize payroll deduction may be cause for discharge if provided for in the collective bargaining agreement.

[75] Applegate v. Grand Blanc Community Schs., TTC 69-8; Jackson v. Swartz Creek Community Schs., TTC 75-12; Viera v. Saginaw Bd. of Educ., TTC 68-14; Hargraves v. Saginaw Bd. of Educ., TTC 68-15.

[76] Viera v. Saginaw Bd. of Educ., TTC 68-14; Hargraves v. Saginaw Bd. of Educ., TTC 68-13.

[77] Applegate [illegible] Grand Blanc Community Schs., TTC 69-8.

[78] Applegate [illegible] Teacher Tenure Commission, No. 114-74-C, Circuit Court, Ingham County (Dec. 24, 1971).

[79] Applegate v. Teacher Tenure Commission, 389 Mich. 375,N.W.2d (1979). Smigel v. Southgate Community Sch. Dist., 388 Mich. 531, 202 N.W.2d 305 (1972)

[80] MCLA 423.210(1)(2), MSA 17.455(10)(1)(C)(2).

[81] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 52 L.E.ed 261, 97 S.Ct. 1782 (1977).

[82] Jackson v. Swartz Creek Community Schs., TTC 75-12.

[83] Id. at 4.

The Commission also stated:

> While not disputing the consitutionality of the "agency shop," this Commission rules that "reasonable and just cause" for dismissal was not supported in this cause against the Appellant. At no time throughout the appeal has the Appellant's moral conduct or ability to teach been questioned. Moreover, she has not been charged with insubordination nor has it been contested that students did not learn. The Commission determines that nonpayment of "agency shop" fees or dues does not meet the standards of reasonable and just cause for discharge within the meaning of the Tenure Act.[84]

In 1978, the Commission[85] held that a tenured teacher is entitled to the procedural protections of the Tenure Act if a controlling board seeks to discharge him for violation of an agency shop fee provision in a collective bargaining agreement. The board in this case had terminated the teacher and admitted that it had not followed the Tenure Act. The Commission never reached the "agency shop service fee/reasonable and just cause" question, holding that the procedures of the Tenure Act must be adhered to in discharging a tenured teacher for failure to pay an agency shop service fee. The Commission stated:

> We do not find a teacher has waived any rights under the Teachers' Tenure Act because her peers have properly agreed to be bound by a contract negotiated in their behalf by a duly authorized collective bargaining agent. . . .[86]
>
> [A]lthough a school board and a teacher's collective bargaining unit *may* negotiate a contract requiring that all employees pay a service fee, and that such is permitted by PERA, MCLA 423.210, MSA 17.455(10), such an agreement does not permit the parties to that agreement to circumvent the protections of the Teachers' Tenure Act by permitting the discharge of a tenured teacher without adherence to the hearing requirements of Article IV of the Teachers' Tenure Act.[87]

The Commission's decision in *Parks* was reversed by the Wayne County Circuit Court. The Court of Appeals affirmed the decision of the Circuit Court.[88] and the Supreme Court affirmed the Court of Appeals' decision.[89] The Supreme Court held that: 1) the Tenure Act is inapplicable, procedurally and substantively, to termination of teachers for non-compliance with an agency shop clause; 2) the Tenure Commission was without jurisdiction in *Parks*, 3) the discharge of Parks was not in contravention of the Tenure Act, and 4) the board was not required to follow the procedural steps of the Tenure Act that require a hearing before discharging a tenured teacher. The Supreme Court did hold that procedures exists under PERA to challenge a claim claim that the agency service fees have not been paid.

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[84] Id. at 6.It is apparent that the Commission majority was attempting to adhere to the guideline that the teacher's activity must have a negative impact on students and staff. The "reasonable and just cause" standard of the Tenure Act has been construed to forbid discharge unless the activity complained of bears a rational and specific relationship to a detrimental effect on the school and the students. Beebee v. Haslett Public Schs., 66 Mich. App. 718, 239 N.W.2d 724 (1976).

[85] Parks v. Sch. Dist. of Detroit, TTC 78-7.

[86] Id. at 10.

[87] Id. at 12.

[88] Detroit Bd. of Educ. v. Parks, 98 Mich. App. 22, 296 N.W.2d 815 (1980). *accord*, White Cloud Educ. Association v. Bd. of Educ., 101 Mich. App. 309, 300 N.W.2d 551 (1980).

[89] Detroit Bd. of Educ. v. Parks, 417 Mich 268, 335 N.W.2d 641 (1983).

An unfair labor practice is committed if a union improperly demands that an employee be discharged for the failure to pay agency service fees or if an employer improperly discharges an employee for failure to pay agency service fees. Therefore, a teacher who contests the legality of the service fee, is free to file an unfair labor practice complaint. The Court stated that "[t]he procedure set forth in PERA for the adjudication of unfair labor practices before MERC (Michigan Employment Relations Commission) is more than sufficient to satisfy any due process concerns that appellants may have."[90]

Teacher Strikes

Because the Michigan Supreme Court has held that labor disputes are best resolved in the appropriate PERA forum,[91] the Commission determined that it did not have jurisdiction to consider an appeal of a teacher who had been discharged for engaging in a strike.[92]

Tenure Commission Hearing Procedures

A few of the procedures for conducting hearings before the Tenure Commission are discussed in this section.

Rules for Conducting the Hearing and Making Decisions

The Tenure Commission relies on the General Court Rules in interpreting and applying its own rules[93] and the Administrative Procedures Act.[94]

Using Administrative Law Examiners.

The Tenure Commission uses attorneys as administrative law examiners. The examiner to whom a case is assigned conducts the hearing and prepares a draft decision containing findings of fact and conclusions of law for the Commission's consideration. This proposed decision, together with the pleadings and evidentiary record, is usually furnished to the Commission members one meeting before the case is placed on the Commission's agenda for decision. The administrative law examiner is also asked to attend the Commission's meeting to present an oral summary of the proposed decision and to respond to questions. The Attorney General has approved the use of administrative law examiners by the Commission:

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[90] Id. at 283, 335 N.W.2d at 648-49.

[91] Rockwell v. Crestwood Sch. Dist., 393 Mich. 616, 227 N.W.2d 736 (1975).

[92] Persky v. Woodhaven Sch. Dist., TTC 80-23.

[93] Tenure Commission Rules of Practice and Procedure, R 38.131 *et seq.*

[94] MCLA 24.201 *et seq*, MSA 3.560(101) *et seq.* The Administrative Procedures Act applies to Tenure Commission hearings. Henderson v. Memphis Community Sch. Dist., 57 Mich. App. 770, 226 N.W.2d 725 (1975); Cohen v. Oak Park Bd. of Educ., TTC 76-40-2.

> It is, therefore, my opinion that the State Tenure Commission may designate and authorize a hearing officer to conduct and be the presiding officer at hearings in teacher tenure cases . . . . It should also be noted that a hearing officer may not decide a contested tenure case. That may be done only by the State Tenure Commission itself based upon its *de novo* review of the record made before the hearing officer and the local board of education.[95]

The opinion of the Attorney General leaves little doubt that the Commission members bear the responsibility to personally review the record made before the administrative law examiner and the local board of education and reach a decision.This does not mean that it must proceed without staff assistance.

Role of the Tenure Commission

The right of appeal to the Tenure Commission establishes a safeguard against the arbitrary and unreasonable dismissal of teachers. In general, the scope of review of the Commission is limited to actions of local school boards against a teacher who has tenure rights.[96]

Under unique circumstances the Commission may take original jurisdiction on appeal of a teacher. In *Oswald v. Port Austin Public Schools*,[97] a case involving the discharge of a superintendent, the local board members were the charging party. They admitted that the superintendent's due-process right to a fair and impartial hearing would be violated if they conducted the hearing. Because of the unique circumstances that existed between the board and its superintendent, the Commission took original jurisdiction.

The role of the Commission is twofold.First, it must review and consider the record made by the controlling board, and it may take additional testimony as required.After hearing new testimony, if any, together with the testimony presented to the school board, the Commission must make a *de novo* decision on all questions of fact and law and enter an order accordingly.

Initially, the Commission mistook its *de novo* obligations. In *Nieuwenhuis v. Swartz Creek Board of Education*, the Commission stated:

> It has been the policy of this Commission not to sit in judgement of a local board's rules when these rules are not vague, indefinite, or applied in a discriminatory manner.

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[95] 1979, p. 115, OAG No. 5053 (May 5, 1977).The Commission has also ruled that the Administrative Procedures Act permits it to consider and rely upon the administrative law examiner's draft decision in reaching its decision. Private Decision, TTC 84-4; Barcheski v. Grand Rapids Public Schs., TTC 77-5-R. For a discussion of the procedures that are considered appropriate see Nolte v. Port Huron Area Schs., Mich. App. , 394 N.W.2d 54 (1986).

[96] Long v. Bd. Educ., 350 Mich. 324, 86 N.W.2d 275 (1957); Rehberg v. Melvindale-Ecorse Township Sch. Dist. No. 11, 345 Mich. 731, 77 N.W.2d 131 (1956).

[97] TTC 70-34.

> To hold otherwise would be to substitute the Commission's values on the wisdom of a rule for the views of the board of education which has been elected by the public.[98]

When the Commission followed this same policy in a later decision,[99] the Court of Appeals found that the Commission had not made a *de novo* review.[100] The Commission had indicated that it gave great consideration to the board's decision and had required the teacher-appellant to prove that the board's decision was arbitrary and capricious even though a *de novo* review places no burden on the teacher. The Commission's opinion was deficient because it failed to include evidentiary findings.

In a *de novo* hearing the school district must prove to the Commission, just as it must prove to the school board, that there is reasonable and just cause for the demotion or dismissal of the teacher. The school district must present its evidence first. The teacher bears no burden of proof in a *de novo* hearing; it is not incumbent upon the teacher to prove that the school board's decision was arbitrary and unreasonable.[101]

The Commission cannot simply "rubber stamp" the local board's decision. The Commission must determine whether the evidence in the record presented before the controlling board and the testimony taken before the Commissioners established the charges by material, competent, and substantial evidence.

The Commission must follow certain guidelines when a procedural has been found at the local district level. The Michigan Supreme Court held that:

> [T]he Tenure Commission may reverse a board decision on the basis of procedural error alone. However, the truth or falsity of the allegations against the teacher is relevant in the fashioning of a remedy. . . .
>
> Where there has been a hearing on the merits by the school board and the Tenure Commission has found a procedural or due process error that cannot be corrected on remand to the board, the commission should not order reinstatement before fulfilling its statutory duty of de novo review on the merits. If there has been no hearing on the merits by the board and the Tenure Commission has concluded that the teacher cannot receive a hearing that comports with due process by the board, the Tenure Commission shall conduct a hearing on the merits before determining if reinstatement is a proper remedy. Until a decision on the merits is reached by the commission, the commission shall not order reinstatement of the teacher.[102]

The Commission's record and decision must contain evidentiary findings of fact and conclusions of law. Proof received by the Commission must be included in the record and support the findings on which the Commission based its decision. The Commission must articulate with clarity and precision its findings and the reasons for them. The Commission must indicate the path it took through the conflicting evidence and indicate the testimony adopted, the standard followed, and the reasoning it used in reaching its conclusions.[103]

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[98] TTC 70-34 at 2.

[99] Luther v. Alpena Public Schs., TTC 71-25.

[100] Luther v. Alpena Bd. of Educ., 62 Mich. App. 32, 233 N.W.2d 173 (1975).

[101] Id. (places the burden of proof on the controlling board); Comstock Public Schs. v. Wildfong, 92 Mich. App. 279, 284 N.W.2d 527 (1979).

[102] Ferrario v. Escanaba Bd. of Educ., 426 Mich. 353, 384 and 388 (1986).

The Commission does not have the authority to provide "equitable relief." This principle was illustrated in *Benton Harbor Schools v. Wolff*.[104] Wolff had been discharged by the Benton Harbor district for reasonable and just cause.On appeal, however, the Commission reinstated her because she had not been given an opportunity to correct her deficiencies. The Commission found that the teaching environment in the building to which she had been newly assigned was substantially different from her previous assignments in the district. Furthermore, she had not been given any preplacement training before she began her duties in her new assignment, and she had been denied an adequate opportunity to correct the deficiencies in her classroom performance.[105] In reversing and holding that the Commission did not have the authority to provide "equitable relief," the Court stated:

> While the State Tenure Commission is "vested with such powers as are necessary to carry out and enforce the provisions of this act", MCL 38.137; MSA 15.2037, it has not been authorized to exercise equitable jurisdiction. The State Tenure Commission is a quasi-judicial body created by the Legislature. Unless expressly authorized, a legislative tribunal does not have equitable jurisdiction.We find no provision in the teacher tenure act authorizing the commission to exercise equitable powers by requiring a controlling board to take affirmative steps to afford specialized training to a teacher who has failed to perform his or her professional duties. We hold that the State Tenure Commission erred in assuming the authority to order equitable relief.[106]

Commission Authority to Award Costs and Attorney Fees

The Tenure Commission is without authority to award costs and attorney fees. The reasons for this holding are discussed in some detail in *Bebeau v. Van Dyke Public Schools*,[107] where the Commission opined that the power to award costs and attorney fees must be specifically conferred by statute, grounded in the traditional equitable authority of the judiciary, or based on an agreement between the parties to pay such expenses. The Commission found no statutory authority or equitable power vested in itself to take such action.

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[103] Luther v. Alpena Bd. of Educ., 62 Mich. App. 32, 233 N.W.2d 173 (1975). In Comstock Public Schs. v. Wildfong, 92 Mich. App. 279, 284 N.W.2d 527 (1979), four commissioners reviewed the evidence. Two supported the board and two found for the teacher. The fifth commissioner voted for reinstatement without reviewing the evidence. The Court of Appeals remanded the case to the Tenure Commission for supplementation and clarification of his opinion.He was directed to "state his reasons for choosing between the two 'reasonably differing views' which are supported by the record." 92 Mich. App. at 286, 284 N.W.2d at 289.

Under the Administrative Procedures Act, final decisions of agencies must contain findings of fact and conclusions of law. MCLA 24.285, MSA 3.560 (185).If such findings are not in the record, a court is required to reverse on appeal. MCLA 24.306, MSA 3.560 (206). The Administrative Procedures Act applies to Tenure Commission proceedings. Henderson v. Memphis Community Sch. Dist., 57 Mich. App. 770, 226 N.W.2d 725 (1975).

[104] 139 Mich. App. 148, 361 N.W.2d 750 (1984).

[105] Wolff v. Benton Harbor Schs., TTC 80-31.

[106] Benton Harbor Schs. v. Wolff, 139 Mich. App. 148, 155-56, 361 N.W.2d 750, 753 (1984).

[107] TTC 78-37-M; *accord*, Rogers v. Clio Area Schs., TTC 81-78; Gray v. River Rouge Sch. Dist., TTC 80-10 and TTC 80-19.

In addition, the Attorney General has reasoned that in the absence of a statutory provision, the Commission is without authority to charge the costs of a hearing to the contestants.[108] It is even questionable whether the Commission has the authority to enforce an agreement by the parties as to payment of costs.[109]

Appeal of Tenure Commission Decisions

The Teachers' Tenure Act does not provide a procedure for judicial review of a final decision of the Tenure Commission. It has been held,[110] however, that decisions of the Tenure Commission may be appealed to circuit court under the Administrative Procedures Act.[111]

Timeliness of Appeal

The Administrative Procedures Act requires that if an appeal is taken from an administrative agency, "proceedings for review shall be instituted by filing a petition in circuit court . . . . within 30 days after personal service or the mailing thereof, if notice is given by mail."[112] The decision in *Shippey v. Madison Public Schools*,[113] illustrates the application of the "thirty-day rule." Shippey had alleged a wrongful termination of her contract, but her appeal to the Commission was not timely.She then appealed to circuit court and was denied a hearing because the appeal was also late. The Court of Appeals held that her late filing in circuit court was fatal to her assertion of rights under the Tenure Act.

Failure to make a timely appeal of a Tenure Commission decision to circuit court constitutes a waiver of the teacher's rights under the Tenure Act, but not including such rights as individual teacher contract rights. In *Bruinsma v. Wyoming Public Schools*,[114] the Court held that the Tenure Act must be construed not to diminish tenured and probationary teachers' "contractual safeguards." The argument that the Tenure Act constituted the sole remedy was rejected, and the Court held that the Tenure Act "does not excuse a school district from honoring a valid contract" and that the circuit court had jurisdiction to consider a breach of contract claim.[115] The same conclusion was reached in *Shippey v. Madison School District*,[116] where the court stated:

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[108] 1956, p. 7, OAG No. 2406 (Jan. 13, 1956).

[109] Rogers v. Clio Area Schs., TTC 81-78.

[110] Nestell v. Bd. of Educ., 138 Mich. App. 401, 360 N.W.2d 200 (1984); Shippey v. Madison Sch. Dist., 55 Mich. App. 663, 223 N.W.2d 116 (1974); Beebee v. Haslett Public Schs., 40 Mich. App. 296, 198 N.W.2d 860 (1972).

[111] MCLA 24.108, MSA 3.560 (21.8).

[112] MCLA 24.108(2), MSA 3.560(21.8)(2).

[113] 55 Mich. App. 663, 223 N.W.2d 116 (1974).

[114] 38 Mich. App. 745, 197 N.W.2d 95 (1972).

> The tenure act does not expressly deprive the circuit courts of jurisdiction to decide common law breach of contract suits. Nor does it limit aggrieved teachers to any particular remedy. Teachers are not required to resort to appeal to the state tenure commission and a request for reinstatement.[117]

Bases on the rulings in *Bruinsma* and *Shippey*, it may be stated as a general rule that if a teacher has not filed timely appeals to either the Tenure Commission or the circuit court, an appeal possibility may exist under teacher contract law.

Commission's Review is Prerequisite to Court Review

Tenured teachers must appeal local school board decisions to the Tenure Commission before a circuit court can assume jurisdiction. Review of a tenured teacher's discharge or other adverse rulings is limited by the rule that an administrative agency's decision is not subject to judicial review until the aggrieved party has exhausted all administrative remedies. This point of law as illustrated in *Elgammal v. Macomb County Intermediate School District*.[118] Elgammal was discharged by the board of education without a hearing. The board claimed it had notified him of the charges against him and that he had not requested a hearing within forty-five days as required by the Tenure Act. The Tenure Commission agreed with the board, but was reversed by the circuit court on the grounds that Elgammal's delay in receiving his notice was reasonable because of hospitalization. The circuit court directed the local board to conduct a hearing and forward its decisions to the court. The court stated that it would hold in abeyance a decision on Elgammal's request for reinstatement and back pay until after the hearing before the board of education.

The Court of Appeals ruled that the circuit court was fully within its powers to remand the matter to the local board for a hearing but that it had erred by directing that the results be forwarded directly to the court, thereby bypassing the Tenure Commission. Such an order, the court held, impermissibly expands the appellate jurisdiction of the circuit court at the expense of the teacher's right to administrative review before the Tenure Commission.[119]

Court Review of Commission Decisions

The standard that appellate courts use to review Tenure Commission decisions is the same as that used to review decisions and rulings of other state agencies and is provided by the state constitution and the Administrative Procedures Act. The constitution provides: "[Appellant] review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and in such cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record."[120] Section 106 of the Administrative Procedures Act provides for the scope of review of the courts.[121] A first responsibility of a reviewing court is to separate the Tenure Commission's findings of fact from its understanding of the law controlling the matter. A Commission decision must not be contrary to law.[122]

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[115] Id. at 749, 197 N.W.2d at 97.
[116] 55 Mich. App. 663, 223 N.W.2d 116 (1974).
[117] Id. at 668, 223 N.W.2d at 119.
[118] 83 Mich. App. 444, 268 N.W.2d 679 (1978).
[119] Id. at 450, 268 N.W.2d at 682.

A. *Construction of Statute*

It has been stated that "the construction placed upon a statute by the agency legislatively chosen to administer it is entitled to great weight."[123] The Court of Appeals provided the standard it will follow in interpreting the Tenure Act:

> In interpreting the tenure act, we are cognizant of several well-established rules of statutory construction. The cardinal rule is to ascertain and effectuate the Legislature's intent in enacting the provision. Where the disputed provision is subject to more than one interpretation, the purpose and objective of the enactment will be reviewed to determine legislative intent. Every part of a statute is to be given effect; one part should not be construed so as to render another nugatory.[124]

B. *Interpreting the Commission's Findings of Fact*

The courts generally follow a hierarchy of deference to Commission findings. The courts will give greatest deference to fact findings in the areas of theCommission's expertise, that is, its area of specialization. Courts generally reserve to themselves broader discretion in reviewing legal determinations of the Commission.

On appeal from decisions of the Tenure Commission, the power of reviewing courts to substitute their judgment for that of the Commission is limited.[125] The guidelines followed by the courts in reviewing tenure appeals were set out in *Michigan Employment Relations Commission v. Detroit Symphony Orchestra Inc*:

> What the drafters of the Constitution intended was a thorough jucicial review of administrative decision, a review which considers the whole record—that is, both sides of the record—not just those portions of the record supporting the findings of the administrative agency. Although such a review does not attain the status of *de novo* review, it

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[120] Mich. Const. art. 6, Section 28 (1963).

[121] MCLA 24.306, MSA 560(206).

[122] Mich. Const. art. 6, Sec. 28 (1963); MCLA 24.306, MSA 3.560(206).

[123] Davis v. River Rouge Bd. of Educ., 406 Mich. 486, 280 N.W.2d 453 (1979). (Despite its pronouncement, the Court disagreed with the Tenure Commission's decision in this matter holding that a delay in furnishing a transcript did not entitle the teacher to automatic reinstatement). *Accord*, Farrimond v. East Jordan Public Schs., 138 App. 51 359 N.W.2d 245 (1984).

[124] Davis v. Harrison Sch., 126 Mich. App. 89, 95, 342 N.W.2d 528, 531 (1983).

[125] Beebee v. Haslett Public Schs. (after remand), 406 Mich. 224, 278, N.W.2d 37 (1979).

> necessarily entails a degree of qualitative and quantitative evaluation of evidence considered by an agency. Such review must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative expertise and not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views. Cognizant of these concerns, the courts must walk the tightrope of duty which requires judges to provide the prescribed meaningful review.[126]

In reviewing a decision of the Tenure Commission, the court may set aside the Commission's decision or order only if substantial rights of the petitioner have been prejudiced or because the decision or order was in violation of a statute or because it was arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion.[127]

On appeal from a decision of the Tenure Commission, a *de novo* review by a court is improper if it reviews the Commission's record, makes its own determination concerning the credibility of witnesses, and weighs the evidence and merits of a case.[128] Appellate courts (circuit, appeals, or supreme) cannot decide questions of fact, except to determine whether the proff supports the findings.[129] The appellate court's responsibility is to determine whether the Tenure Commission's decision, findings, rulings, and orders are supported by competent, material, and substantial evidence on the whole record.[130]

The court may not substitute its judgment for that of the Commission. When it is alleged that the Commission's decision is not supported, the reviewing court must examine the entire record to determine the sufficiency of the evidence. This examination must avoid invasion of the Commission's fact-finding responsibility and afford the plaintiff a meaningful review of the decision.

In an appealed case from the Tenure Commission, the Michigan Supreme Court stated its role:

> We cannot, certiorari or otherwise, review and decide questions of fact brought by appeal to one decided by the commission. Our only function is to determine from the record whether proof received by the controlling board, or the Commission, or both supports findings on which the commission has decided for or against the appealing teacher.[131]

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[126] 393 Mich. 116, 124, 223 N.W.2d 283, 287 (1974).

[127] Farrimond v. East Jordan Public Schs., 138 Mich. App. 51, 359 N.W.2d 245 (1984).

[128] Cook v. Sturgis Public Schs., 144 Mich. App. 427, 144 Mich. App. 427 (1984); Comstock Public Schs. v. Wildfong, 92 Mich. App. 279, 284 N.W.2d 527 (1979).

[129] Beebee v. Haslett Public Schs., 66 Mich. App. 718, 239 N.W.2d 724 (1976); Freiberg v. of Big Bay de Noc Sch. Dist., 61 Mich. App. 404, 232 N.W.2d 718 (1975).

[130] Beebee v. Haslett Public Schs. (after remand), 406 Mich. 224, 278 N.W.2d 37 (1979; Long v. Bd. of Educ., 350 Mich. 324, 86 N.W.2d 275 (1957); Farrimond v. East Jordan Public Schs., 138 Mich. App. 51, 359 N.W.2d 245 (1984); Portland Schs. v. Dowling, 138 Mich. App. 824, 360 N.W.2d 315 (1984); Sutherby v. Gobles Bd. of Educ., 138 Mich. App. 579, 348 N.W.2d 277 (1984); Cook v. Sturgis Public Schs., 144 Mich. App. 427, 375 N.W.2d 740 (1984); Luther v. Bd. of Educ. of Alpena, 62 Mich. App. 32, 233 N.W.2d 173 (1975).

[131] Long v. Bd. of Educ., 350 Mich. 324, 326, 86 N.W.2d 275, 276 (1957).

An example of a reversal of a Tenure commission decision is provided in *Freiberg v. Big Bay de Noc School District*.[132] The Commission found that Freiberg had been laid off in good faith and because of financial difficulties, although it acknowledged that animosity had existed between the school board and Freiberg. The Court of Appeals held the Commission's decision was not supported by substantial evidence on the whole record. The Court reversed the Commission and ordered Freiberg's reinstatement. The Court stated reasons for the reversal.

In *Sutherby v. Gobles Board of Education*, the Court discussed its role in reviewing a Commission decision:

> The substantial evidence standard requires a through review of the evidence in an administrative proceeding, not limited to those portions of the record supporting the findings of the administrative agency. In making this factual review, however, courts must accord due deference to administrative expertise. This Court must also be careful not to invade the province of administrative fact-finding by displacing the agency's choice between two reasonably differing views. To grant appellant relief from the tenure commission's decision would, we believe, require that we ignore administrative expertise and displace the tenure commission's choice between two reasonably differing views.[133]

If a party is disappointed with the results of circuit court review, further review is possible to the Court of Appeals. At any level, an appeal may be limited to challenging a particular element of the case rather than the entire decision.

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[132] 91 Mich. App. 462, 283 N.W.2d 775 (1979).

[133] 132 Mich. App. 579, 588-89, 348 N.W.2d 277, 281-82 (1984).

CHAPTER XI

Remedies for Wrongful Suspension, Demotion or Discharge

Introduction

In authorizing suspension of teachers, the legislature has provided remedial protection for wrongful decisions by school boards against tenured teachers.

> On the filing of charges . . . ., the controlling board may suspend the accused teacher from active performance of duty until a decision is rendered by the controlling board, but the teacher's salary shall continue during such suspension: Provided, That if the decision of the controlling board is appealed and the tenure commission reverses the decision of the controlling board, the teacher shall be entitled to all salary lost as a result of such suspension.[1]

This language appears to be restricted to only those situations where a school board has suspended a teacher until rendering a decision adverse to the teacher and thereafter has its decision reversed by the Tenure Commission. However, implied in the statute is the remedial principle of reinstatement with back/pay. Back/pay, of course, is compensation for the tangible economic loss resulting from an unlawful employment practice. For example, the Tenure Commission has ordered "reinstatement with all lost wages" when a school board incorrectly refused recall to laid-off teachers[2] and when a board failed to assign a teaching position to a teacher returning from a leave of absence.[3] Such an interpretation is in harmony with the legislative policy of protecting teachers from arbitrary and unreasonable practices of school boards.

When reinstatement is ordered, two issues remain to be resolved. What is the amount of the backpay award, if any, the teacher is entitled to receive from the district? And, did the teacher make a reasonable effort to obtain alternative employment during the period of his improper termination?

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[1] MCLA 38.103, MSA 15.2003.

[2] Chester v. Harper Woods Public Schs., TTC 73-64.

[3] Ross v. Mona Shores Schs., TTC 75-30.

Precedents

It is the Tenure Commission's duty to provide a forum for determining the amount of salary lost and whether the teacher has excercised reasonable effort to obtain alternative employment.[4] The Commission will defer consideration of these issues, however, until the question of whether the teacher was unlawfully discharged has been finally resolved, perhaps by a court.[5]

Some of the principles now relied upon by the Commission for determining appropriate backpay awards were developed prior to the adoption of the Tenure Act in cases where school boards wrongfully breached teachers' individual contracts.[6] In these cases,[7] once the Court had decided that a valid contract existed and had been breached, it became necessary to determine the remedy. Reinstatement, of course, was ordered in nearly all cases. The money damages were the amount agreed upon for the teacher's services under the contract. However, the board was entitled to deduct from that amount whatever the teacher earned or could have earned in other employment.

The courts ruled that the law did not require the teacher to seek or accept service of a different grade or character[8] or of any other line of service[9] or vocation[10] than that in which he had been employed by the board; nor was he required to seek employment in a different region or locality.[11]

The case of *Edgecomb v. Traverse City School District*,[12] a non-tenure case, illustrates the courts' thinking. Edgecomb was discharged before his contract expired. He did not obtain other employment in the teaching profession. The Court awarded damages equal to the amount he would have received had he taught. The board contended that Edgecomb did not make a reasonable effort to mitigate his damages. Although the Court ruled that the teacher's duty to do so was unquestioned, the burden of proof rested on the board to show that the teacher might have secured other employment in the teaching profession if he had undertaken the obligation in good faith. The superintendent testified about a possible opening but did not present evidence that the teacher could have obtained the position or that it would have been reasonably within his field of work. The Court found that the board had failed to show that the teacher might have lessened the damages he actually sustained because of the breach of contract. The Court cited with approval the language in *Byrne v. Independent School District of Stable*.

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[4] Masters v. Hamtramck Bd. of Educ., TTC 77-20-M. If the teacher is ordered reinstated and the parties cannot reach agreement on the amounts owing, either party may move the Commission for hearings on the issues in dispute.

[5] Ferrario v. Escanaba Bd. of Educ., 426 Mich. 353, N.W.2d (1986); Shiffer v. Gibraltar Schs., 393 Mich. 190, 224 N.W.2d 255 (1974).

[6] The provisions of the Tenure Act become a part of the contract of employment of every teacher protected by the Act. See Ellis v. Wakefield Township Sch. Dist., 79 Mich. App. 340, 261 N.W.2d 320 (1977); Shiffer v. Gibraltar Sch. Dist., TTC 69-18-M; Brown v. Marshall Public Schs., TTC 78-33; Lyon v. Wyoming Public Schs., TTC 77-37.

[7] Steel v. Charlevoix Twp. Unit Sch. Dist. No. 1, 351 Mich. 152, 88 N.W.2d 278 (1958); Edgecomb v. Traverse City Sch. Dist., 341 Mich. 106, 67 N.W.2d 87 (1954); Farrell v. Sch. Dist. No. 2 of Rubicon, 98 Mich. 43, 56 N.W. 1053 (1893); Smith v. Sch. Dist. No 2 of Pleasant Plains, 69 Mich. 589, 37 N.W. 567 (1888); Crane v. Sch. Dist. No. 6 of Bennington, 61 Mich 299, 28 N.W. 105 (1886).

[8] Farrell v. Sch. Dist. No. 2 of Rubicon, 98 Mich. 43, 56 N.W. 1053 (1893).

[9] Edgecomb v. Traverse City Sch. Dist., 341 Mich. 106, 67 N.W.2d 87 (1954).

[10] Smith v. Sch. Dist. No. 2 of Pleasant Plains, 69 Mich. 589, 37 N.W. 567 (1888).

[11] Byrne v. Independent Sch. Dist. of Struble, 139 Iowa 618, 117 N.W. 983 (1908).

[12] 341 Mich. 106, 67 N.W.2d 87 (1954).

> When such contract is disregarded by the school district and the teacher is denied the right to perform, it is her duty to find other employment, and when sued, the school district may show that she has found other employment, or that by the use of reasonable diligence she might have found other employment for the purpose of mitigating the damages; but, if the discharged teacher did not accept other employment, her damages should not be diminished for failure to secure it, unless it be shown that by reasonable diligence she might have secured employment of the same grade in the same locality where she was employed to teach. She was not required to accept employment in another locality or of a different or lower grade. The law is very clear on this proposition.[13]

The Commission and the courts have utilized these "breach of individual contract" decisions to interpret the Tenure Act's reinstatement and backpay policy. One principle adopted from these decisions is the "common law" rule of mitigation of damages in fashioning a remedy for wrongfully suspended, demoted, or discharged tenured teachers.

Doctrine of Mitigation

When it is shown that interim employment was obtained, or could have been obtained, by an improperly discharged teacher, the measure of backpay becomes the difference between the salary agreed upon in the teacher's contract and the amount of money that was obtained, or might have been obtained, in other employment.[14] Deductions from employment not taken will not be allowed if the employment was not of similar character. But if employment not of similar character is taken, those amounts of money will be deducted, provided that the hours of the employment would have conflicted with the school day.[15]

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[13] 139 Iowa 618, 619, 117 N.W. 983, 984 (1908) cited in Edgecomb v. Traverse City Sch. Dist., 341 Mich. 106, 116, 67 N.W.2d 87, 91 (1954).

[14] An unlawfully dismissed teacher is probably entitled to participate in school security and retirement programs based on the damages awarded and can recover for amounts spent to replace fringe benefits he would have received. Bode v. Roseville Public Schs., TTC 72-45-M. The Commission adheres to the rule that actual medical expenses that would have been covered by the district's health insurance must be reimbursed. Beymer v. River Rouge Schs. Dist., TTC 82-51-M; Bode v. Roseville Schs. Dist., TTC 72-45.

[15] Harper Woods Teachers v. Harper Woods Bd. of Educ., 103 Mich. App. 649, 302 N.W.2d 857 (1981). "[T]eachers were not required to mitigate by accepting employment outside of teaching, in another community, or at a lower status. While not required to accept such employment any wages actually earned by the teachers in such employment which would not have been earned if they were still teaching is properly subtracted from the damages awarded." Id. at 656, 302 N.W.2d at 861.

In *Shiffer v. Gibraltar School District*, Justice Levin wrote:

> The doctrine of avoidable consequences/mitigation of damages takes into account the unique problem facing teachers in obtaining substitute employment. The common law does not "burden" them "with the task of scrounging around for other employment while challenging an unjust suspension." The common law recognizes that besides the difficulty of obtaining midyear employment, for many teachers their former employer is the only employer in town. The common law recognizes these problems and imposes no duty on teachers to accept employment outside of the teaching profession, or to accept a teaching position in another community, or at a lower status.[16]

The *Shiffer* Court rejected the argument that the teacher was entitled to "all salary lost," without the necessity of mitigation, as a financial penalty to the school board. Awards of large sums that are unrelated to a teacher's actual loss would not, in the Court's opinion, advance "the future of our children, the efficacy and dignity of the teaching profession and the welfare of the state."[17] The mitigation issue was remanded to the Tenure Commission for determination of the amount of backpay award, with the following instructions:

> [T]o deduct from the "salary" Shiffer would have earned all wages he actually earned that he would not have earned if he were employed as a teacher, and . . . to consider any evidence the school district offers that Shiffer, through exertion of proper efforts, could have earned more.[18]

Standards for Mitigation

The initial mitigation decision of the Commission was on order of remand from the Michigan Supreme Court in the matter of *Rumph v. Wayne-Westland Community Schools*.[19] This was the Commission's first attempt to fashion standards and guidelines for the mitigation of damages under the Teachers' Tenure Act.

The Commission reviewed the principles on which mitigation of damages is founded. It concluded (1) that mitigation furthers public economic policy by avoiding waste, (2) that a wronged person has an affirmative duty to avoid the damages caused by the improper action of another, (3) that one injured by the actions of another is to be placed into no better a position than he would have been had there been no injury, and (4) that mitigation is the tool to achieve that goal. The Commission held that the burden is on the controlling board to establish whether or not the teacher has made reasonable efforts to avoid the consequences of the board's wrongful act, and that this burden must be met by a preponderance of the evidence. The board must establish that the teacher did not take reasonable steps to mitigate foreseeable damages and that, had other employment been accepted, he could have avoided his damages in whole or in part without undue risk an without suffering humiliation.

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[16] 393 Mich. 190, 198, 224 N.W.2d 255, 258 (1974).

[17] Id. at 200, 224 N.W.2d at 259.

[18] Id. at 208, 224 N.W.2d 263. The *Shiffer* Court seemed to recognize the problem of large potential liability faced by school boards: "The backlog of cases pending before the Tenure Commission and the unfortunately slow appeal process means that it will often be years before teachers who ultimately prevail are reinstated. Shiffer, for example was reinstated four years after his suspension. The teacher in Rumph v. Wayne Community School Dist., 31 Mich. App. 555; 188 N.W.2d 71 (1971) . . . was suspended eight years ago. . . . The amounts involved are not inconsiderable. In Shiffer's case the amount potentially involved is four years' salary; in Rumph's, eight years." Id. at 199, 224 N.W.2d at 259.

[19] TTC 67-2-M.

As to the question of "reasonable diligence," the Commission held the following criteria to be critical:

1. The market place: Its size is determined by the number of districts in which the teacher is expected to seek employment, the availability of jobs within those districts, and the ease of obtaining those available jobs.
2. The teacher's degree, teaching certificate, seniority, and experience.
3. The effort the teacher expended to establish reasonable diligence, as evidenced by formal, written applications or informal inquiries and frequency of contacts.
4. The negative impact that the possibility of reinstatement might have on a new employer's decision to hire.

The school board bears the responsibility of showing what the teacher, had he used reasonable diligence to seek alternative employment, could have earned during the backpay period. In *Shiffer v. Gibraltar School District*[20] the Court adopted the common-law principle that the board of education carries the burden of showing that the teacher might have secured other employment in the teaching profession if he had undertaken the obligation in good faith.

The critical factor is not the availability of jobs, but rather the effort the teacher expends in seeking a job. A controlling board does not meet its burden by merely showing that jobs were available. The mere fact jobs were available does not, in and of itself, establish the failure to mitigate. Furthermore, mitigation does not require that the teacher secure another position; it requires him to make an attempt to find similar employment in order to minimize, or mitigate, his damages.The Commission has stated:

> Mitigation imposes upon the one upon whom the burden to mitigate falls the duty to make a good faith effort to seek alternative employment. Our ultimate determination in these matters will rise and fall not on the number of jobs available, but rather on the efforts the teacher made in seeking those jobs. It is the effort displayed by the teacher in these matters that is the key to the questions presented in determining the issue of mitigation.[21]

A determination of whether the teacher has diligently sought other employment will be made by the Tenure Commission based on the record. The standard for determining reasonable diligence has been stated as:

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[20] 393 Mich. 190, 224 N.W.2d 255 (1974).

[21] Rumph v. Wayne-Westland Community Schs., TTC 67-2-M at 13.

> What constitutes reasonable diligence is a question of fact depending upon the circumstances of each particular case. The manner in which a person of ordinary diligence would presumably act under similar circumstances is the standard by which the court should determine whether this duty was properly performed. . . . He should try to diminish the loss resulting from the breach of contract by making such efforts to secure employment as an average person would make at that particular time and place.[22]

The teacher's obligation to seek alternative employment is limited to positions "of like nature." Jobs of "like nature" are those positions for which the teacher has appropriate certification and qualifications, but they are not necessarily specifically similar to that position from which he was discharged. In a case where a superintendent was improperly terminated, however, the Commission held that his efforts to secure interim employment should have included application for classroom teaching positions.

To establish reasonable diligence, efforts made by teachers to obtain interim employment must be supported by evidence that teaching positions were not available, or that those available were not of like nature or were of lower status. A position of lower status might be one where, even if the teacher were hired, he would receive only partial salary credit for prior experience.

Substitute teaching positions are jobs of lower status than regular full-time positions. Substitutes are generally paid at a much lower rate than regular teachers. The available substitute positions seldom offer more than day-to-day or "on-call" employment, and the teacher is faced with a new and unfamiliar class of students every day.[23]

The argument has been made, and rejected, that the mitigation doctrine requires that a wrongfully discharged teacher who, after a reasonable period of time, is unable to locate work of the kind to which he or she is accustomed must "lower his sights" and consider accepting other available employment even if the pay rate is lower. Also, the Court has rejected the "most successful employee" doctrine, under which the mitigation efforts of two or more persons wrongfully discharged by the same employer are judged according to the efforts of the employee who is most successful at obtaining alternative employment.[24]

A "discharged teacher acting with reasonable diligence should file written applications with at least a majority of those school districts within the locality seeking a permanent teaching position each year said teacher is unemployed."[25] The Commission has defined "locality" as the area comparable to the distance the teacher traveled to get to the job from which he was discharged, or a reasonable distance from his home.[26] However, in *Sprik v. Grandville Public Schools*, the teacher traveled five miles from his home to his position at the Grandville Schools and the Commission ruled that the localities within which Sprik was required to seek alternative employment were those within 25 miles of his home.[27]

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[22] Id. at 5, citing Atholwood Development Co. v. Huston, 19 A.2d 706, 708 (Maryland, 1941).

[23] Bode v. Roseville Public Schs., TTC 75-45-M.

[24] Harper Woods Teachers v. Harper Woods Bd. of Educ., 103 Mich. App. 649, 302 N.W.2d 857 (1981).

[25] Rumph v. Wayne-Westland Sch. Dist., TTC 67-2-M at 13.

[26] Sprik v. Grandville Public Schs., TTC 74-40-2-M at 11.

Efforts to obtain new teaching positions might include phone contacts, interviews, school visits, mail contacts, and the submission of applications throughout the period of improper termination.

The question has arisen as to the whether a teacher's obligation to seek interim employment as a teacher continues after obtaining a nonteaching job. In *Bebeau v. Van Dyke Public Schools* the teacher obtained full-time employment at a coal mine in Kentucky. The job rendered him unavailable for employment as a teacher. During the period he held the job at the coal mine he did not seek a teaching position. The board argued that its entire backpay liability for the time Bebeau was employed at the mine should be deducted from earnings owed. The Commission disagreed:

> [I]n situations where the teacher gains full time employment but does not attempt to find employment as a teacher, the controlling board must carry its proofs one step further. The school board must show that appropriate teaching positions were available that would have afforded the teacher a salary greater than that which he or she was already earning. . . . Only then would we regard such a teacher's failure to make application for teaching positions as proof of a lack of reasonable diligence.[28]

To establish reasonable diligence, applications for teaching positions must be timely.In *Sprik v. Grandville Public Schools*,[29] the teacher had made applications shortly before or after the school year commenced. The board established that it is common practice to consider applications and fill positions as early as April because hiring decisions are made before the end of the preceding school year. Applications made after the end of the preceding school year are insufficient to establish reasonable diligence for the first term of the ensuing school year. Because of his failure to make timely applications, Sprik was not entitled to recover for a full-year salary.

In another decision, the Court of Appeals held that when a teacher failed to make any efforts whatsoever to locate employment from the time of her improper layoff until the second semester, she was denied backpay for the first semester.[30] These decisions indicate that teachers should make timely applications for *each* school semester.

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[27] Id. The Commission has held that a teacher was not required to accept a teaching position in West Virginia. However, when he did, the salary earned was deducted from the backpay he was owed. Beymer v. River Rouge Sch. Dist., TTC 82-51-M.

[28] TTC 78-37-M at 7.

[29] TTC 74-40-2-M at 11.

[30] Harper Woods Teachers v. Harper Woods Bd. of Educ., 103 Mich. App. 649, 302 N.W.2d 857 (1981).

The Commission's decision in *Bode v. Roseville School District*[31] also illustrates failure to exercise due diligence in making applications for vacancies. Bode submitted only five applications for positions during a period of more than five years. The Commission did not accept Bode's argument that it would have been futile to make more applications because of the publicity surrounding his dismissal.

A teacher will not be excused from making efforts to seek interim employment because the chances for employment are virtually impossible and could not have been found.[32] The Commission adheres to the rule that "mitigation does not require that one obtain alternative employment, mitigation requires only a good faith effort to seek employment."[33]

Deductions from Compatible and Incompatible Employment

Compatible employment is that employment in which a teacher might have earned money even while serving as a teacher.[34] Earnings that a teacher could have earned while also working as a teacher does not serve to lessen the district's backpay obligation. For example, a teacher's wages during the summer months when his services are not required constitute compatible earnings. These are wages the teacher could have earned even if employed as a teacher. Therefore, they may not be deducted from the district's obligation. Earnings from compatible employment occurred when a teacher earned $260 from church-related speaking engagements on Sundays.[35] In another case, wages earned as a tour guide during the summer months could not be used as a "set-off" against a backpay award.[36]

Incompatible employment is employment that a teacher could not have accepted because it would have conflicted if he were teaching. When a teacher worked as a supervisor of student teachers at a university during a period that would have been incompatible with his teaching position, his backpay award was reduced by $19,000.[37] When a teacher engaged in full-time real estate sales that occurred during school hours, those earnings were deducted from the backpay obligation.[38]

When a teacher worked at a coal mine in Kentucky, his earnings, including overtime, were deducted.[39] The Commission has allowed deductions for profits from purchasing, repairing, and selling houses.[40] But an increase in a teacher's net worth as a result of working on his own property was not allowed to be used as a set-off against the district's obligation.[41]

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[31] TTC 72-45-M-2.

[32] TTC 72-45-2-M. In Sprik v. Grandville Public Schs., TTC 74-40-2-M at 12 the Commission held that "the question of adverse publicity may impact on the issue of alternative employment obtained in light of jobs available, it does not lessen the teacher's duty to seek alternative employment."

[33] Sprik v. Grandville Public Schs., TTC 74-40-2-M at 10.

[34] Bebeau v. Van Dyke Public Schs., TTC 78-37-M; Rumph v. Wayne-Westland Community Schs., TTC 67-2-M; Shiffer v. Gibraltar Sch. Dist., TTC 68-18-M.

[35] Sprik v. Grandville Public Schs., TTC 74-40-2-M.

[36] Rumph v. Wayne-Westland Sch. Dist., TTC 67-2-M.

[37] Id.

[38] Bode v. Roseville Public Schs., TTC 75-45-2-M.

[39] Bebeau v. Van Dyke Public Schs., TTC 78-37-M.

In *Shiffer v. Gibraltar School District*, the teacher earned $1,300 during normal business hours working for a newspaper; this constituted a set-off against his backpay award. In addition, his earnings from operating a photographic studio were counted as wages he would not have earned if he were employed as a teacher and were deductible from the salary owed. However, earnings from the studio during the summer months could not be deducted.[42]

Unemployment compensation may not be deducted from earnings owed.[43]

Obligation to Return Teacher to a Comparable Position

When complying with an order of reinstatement, the controlling board must place the reinstated teacher with in a position comparable to the last position held, within the teacher's certification and qualifications. To properly comply with a reinstatement order, the board must give the teacher a class schedule, *at the earliest possible date*, that provides the teacher with an position of a "like nature" similar to that which he last held. However, the Commission has recognized that in many cases a board would be unable to return a discharged teacher to the same position he had held prior to discharge, because of changes in student enrollment, course preferences of students, and the content of the programs offered.

Mid-year reinstatements may create a problem. At the time the teacher in *Sprik v. Grandville Public Schools*,[44] was discharged, his schedule was composed of nine-week courses in grammar (basic and advanced), mechanics of writing, and vocabulary. The majority of the students were ninth-graders. Although his classes were elective, they were recommended to college-prep students. When Sprik was reinstated in mid-year, he was placed in a substitute position. Sprik argued that his seniority afforded him the right to select the advanced courses he wished to teach. But the "earliest possible date" assignment policy would have caused a disruption of the educational program had he been given an assignment of "like nature" in mid-year.

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[40] Bode v. Roseville Sch. Dist., TTC 72-45-R.

[41] Sprik v. Grandville Public Schs., TTC 74-40-2-M.

[42] TTC 68-15-M.

[43] Bebeau v. Van Dyke Public Schs., TTC 78-37-M. In this case the Commission stated that "[t]he reason that unemployment compensation benefits should not be deducted is because of their purpose, and not due to the employment relationship under which they occurred. Unemployment compensation statutes were enacted to relieve the distress engendered by unemployment. Most generally, the benefits received under such systems are collateral to the employment relationship and should not be considered as wages." At 11.

[44] TTC 74-40-2-M.

Interest on Backpay Awards

The Tenure Commission will award interest on backpay awards, pursuant to a letter opinion from the Attorney General dated February 21, 1979.

> Interest on funds actually lost by tenure teachers is part of the actual economic loss to them and allowance of interest will compensate wrongfully discharged tenured teachers for the loss of the use of their funds. A corollary to the policy of mitigation of damages is the application of interest to the funds actually lost.It will be noted that the salary of a teacher is a sum certain and the damages allowed by statute are therefore liquidated. Therefore, the Supreme Court interpretation of the phrase "all salary lost" to mean "actual economic loss," would include interest on this liquidated sum.

In this same letter, the Attorney General stated that "an award of interest runs from the time each paycheck would have been paid to the wrongfully discharged teacher less the amount that the teacher earned or could have earned for that particular pay period as mitigation." The Attorney General held that the legal rate of interest for this purpose is 5 percent per year.[45]

Award of Costs and Attorney Fees

The power to award costs and attorney fees is limited to power expressly conferred by statute.[46] The Commission has not been given such authority, except where there is an agreement, contract, or stipulation between the parties to pay costs and fees.[47]

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[45] Shiffer v. Gibraltar Sch. Dist., TTC 69-18-M at 16.

[46] 1955-56, vol. I, p. 7, OAG No. 2406 (Jan. 13, 1956).

[47] Bebeau v. Van Dyke Public Schs., TTC 78-37-M.

CHAPTER XII

Miscellany

Several topics related to tenure rights of teachers and administrators are reveiwed in this chapter. These topics include transfer and assignment within a district, transfer to another district, school district reorganization, extra duty/extra pay assignments, and multi-employer arrangements.

Transfer and Assignment of Tenured Teachers

The Tenure Act does not guarantee that a teacher must be retained in a particular school or assigned to teach any certain grade or level, or at certain school building.

Boards of education, in order to maintain efficiency and to solve personnel problems, have discretionary authority to transfer professional personnel to positions in keeping with their certification, qualifications and the terms of the teachers' collective bargaining agreement. Transfers may be made to a different school building, level, section, or grade. There was never any intention of the legislature to confer upon employees any special privileges to enable them to retain permanently their positions or pay regardless of changing conditions. The statutes providing for permanent tenure are interpreted as intending only to regulate dismissal for causes personal to the employee.[1]

Transfer of a teacher to a different assignment, grade or school does not constitute a demotion.[2]

Michigan school boards also have the power to assign, reassign, or transfer principals, and superintendents. However, no teacher may be assigned to a position for which he is not certified.

In exercising such power, the school authorities ordinarily have wide discretion, the criterion being that the board of education has the authority to make teaching assignments in the best interest of the school district. However, the power to assign and transfer must be exercised in good faith. A transfer may not be made for the purpose of compelling a teacher's resignation. A teacher's refusal to accept a reasonable assignment that the school authorities have the power to make constitutes grounds for dismissal.

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[1] 1961-62, p. 264, OAG No. 3609 (Feb. 7, 1962).

[2] Stone v. Fraser Public Schs., TTC 84-38. The Commission held in *Stone* that a counselor who was transferred to a home economics teaching position was not demoted because her pay was not reduced.

A contract for employment may stipulate the assignment, reassignment, or transfer. Under terms of the contract, the teacher agrees to teach in a school as designated by the school authorities and thus the teacher is under obligation to teach in that school. If the teacher has a right under his contract to an assignment to a particular position, the board has no power to assign him to a different position.

Many Michigan school boards use annual supplementary contracts for tenured teachers that state the salary for the ensuing school year and includes a statement such as the following: "Failure to return acknowledgment of this form before [some specified date], forfeits your rights to placement in your present position or building." If the teacher complies with the request, it could be assumed the teacher would possess contractual rights to a position in the building or to his present assignment.

Effect of Transfer to Another District on Tenure Rights

If he takes a position in another district, a teacher who has acquired tenure in one district is not subject to more than a one-year probationary period, effective the date of employment. The employing board has an option, however, of placing such a teacher immediately on continuing tenure. Of course, the teacher would have the option of declining the position unless placed on immediate tenure.

The question sometimes arises whether a tenured teacher transferring in from another district may be required to serve an additional year of probation similar to the third year of probation permissible for teachers completing their first two years of employment.It is clear that a tenured teacher who moves to another district cannot be required to serve more than one year of probation. Sixty days before the end of that probationary year, the board has the option of releasing the teacher or of granting tenure; but it cannot require another year of probation.

Another question is whether a nontenured teacher who has served one year of satisfactory probationary service and transfers to another district is required to serve one, or two, more years of probationary service before becoming eligible for tenure. Neither the Attorney General nor the courts of Michigan have ruled on this question. The Michigan Teachers' Tenure Act states:

> After the satisfactory completion of the probationary period, a teacher shall be employed continuously by the controlling board under which the probationary period has been completed. . . .[3]

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[3] MCLA 38.91, MSA 15.1991.

It seems reasonable to interpret the legislature's intent as requiring each of the first two years of probation to be completed in the same school district. Therefore, if a teacher has completed only one year of satisfactory service before transferring to another district, he would be required to serve a two-year probationary period in the new district. However, if the teacher completes a satisfactory two-year probationary period and is eligible for tenure, but decided to transfer, he is probably eligible to be employed as a tenure teacher is his new position. He could not be required to complete a new two-year probationary period.[4]

School District Reorganization and Tenure Rights

The question sometimes arises regarding the status of tenured teachers when the district to which they are under contract is annexed by, or attached to another district, or becomes part of a consolidated district.[5]

Teachers on continuing tenure in an annexed district may be placed on probation, not to exceed more than one full year, by the controlling board of the annexing district.

> If a teacher on continuing tenure becomes an employee of another controlling board as a result of school district annexation, consolidation or other form of school district reorganization, he shall be placed on continuing tenure within 30 days unless the controlling board, by a ⅔ vote on an individual basis, places the teacher on not more than 1 year of probation.[6]

The year of probation commences on the date the annexation becomes effective. For example, if district A annexes to district B on December 1, the term of probation for the district A teachers ends on November 30 of the next year.A teacher who is to be dismissed must be notified that his work is unsatisfactory and given a dismissal notice sixty days before November 30.[7]

Teachers in a Michigan school district that is dissolved and attached to an existing district will have their contracts honored by the attaching district. The teachers in the attached district may be required to serve a probationary period of not more than one year.[8]

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[4] In Holton Public Schs. v. Farmer, 77 Mich. App. 765, 259 N.W.2d 219 (1977), the court held that ". . . the teacher who has satisfactorily completed probation, acquiring tenure, must be accorded a favored status vis-a-vis nontenured applicants for available positions for which the teacher is certified and qualified." (At 770-771). It seems to the author that similar favored status should be accorded to a teacher who has satisfactorily completed a probationary period and immediately accepts a teaching assignment in another district.

[5] In annexation, the voters in the annexed area vote to become part of another district. When a district is disorganized, it is because of too few students or lack of sufficient number of board members.In consolidation, voters in all districts vote. In annexation, the annexing district continues as a governmental entity, the annexed district is dissolved, and the board of education of the annexing district assumes control over the annexed area. When a district becomes disorganized, it will be attached to another district. In consolidation, if school districts A, B, and C consolidate into D, district D is a newly created governmental subdivision.1959-60, pt. 1, p. 181, OAG No. 3363 (Sept. 2, 1959).

[6] MCLA 38.92, MSA 15.1992.

[7] 1959-60 pt. 1, p. 181, OAG No. 3364 (Sept 2, 1959).

Tenured teachers in *annexing* or *attaching* districts retain full tenure rights and cannot be required to serve a one-year probationary period after the annexation or attachment.

When school districts are *consolidated*, all tenured teachers in all the districts involved may be placed on immediate tenure or on one year's probation, at the discretion of the new controlling board of the consolidated district.

Probationary teacher, in either annexation, attachment, or consolidation, will probably have valid contracts that must be honored by the annexing district, in the case of annexation, by the attaching district, in case of attaching, and by the new board, in case of consolidation.[9]

Tenure Rights in Extra Duty/Extra Pay Assignments

Many Michigan teachers are employed to teach a regular teaching assignment, for which they are compensated on the basic salary schedule, and, in addition, are paid extra for assuming an assignment such as sponsoring a club, supervising cheerleaders or coaching athletic teams. At issue is whether these extra duty/extra pay assignments are protected by the provisions of the Tenure Act.

Prior to 1963, a teacher's or administrator's salary could not be reduced when he was relieved of extra duty or responsibilities. A teacher entrusted with a position of extra responsibility, that carried compensation above the basic salary schedule, was deemed to possess such experience, training, and other qualifications as to command higher pay.[10] He was therefore entitled to continue to receive the higher compensation by reasons of such qualifications, regardless of whether he continued to be assigned extra duties.

MCLA 38.101, MSA 15.2001, provides that a tenured teacher cannot be demoted except for reasonable and just cause and only after notice and a hearing. Except for layoff,[11] the elimination of duties or responsibilities that are part of the teacher's regular assignment cannot be used as a device for a reduction in a teacher's basic salary that is, in effect, a demotion.

In 1963, the Michigan legislature amended the Tenure Act to permit salary reductions when extra services, duties, and/or responsibilities were reduced.[12] As a result, it would now be held that any rights a tenured teacher has under the

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[8] Id.

[9] Because school district reorganization proposals threaten the job security of all employees of the affected districts, mergers in recent years have given careful consideration to future employment opportunities of teachers and administrators. This is often necessary in order to gain the support of the employees for the reorganization.

[10] Board of Education of Nelson County v. Lawrence, 375 S.W. 830 (Ky. 1962).

[11] For example, a teacher's job assignment could be partially reduced because of declining enrollments. See Chapter V, Layoff and Recall.

[12] MCLA 38.91, MSA 15.1991.

Tenure Act do not extend to automatic continuation of extra pay for extra duty. If the teacher is relieved of the extra duty and his pay reduced, he has not been demoted.

Multi-Employer Arrangements

A number of Michigan districts are involved in joint ventures, such as consortium programs, with other districts. The most common of the arrangements provide special education or adult education services. Some programs are organized to take advantage of federal funding opportunities. When these joint venture programs employ tenured teachers there is a question as to which of the consortium districts is obligated to recognize the tenure rights of the program tenured teachers and administrators. It is possible under certain circumstances for a teacher to acquire tenure rights in more than one of the consortium districts.[13]

When this issue comes before the Commission it applies an "economic reality test" that it described.

> The Teachers' Tenure Act defines a teacher as a certificated person "employed. . .by any board of education or controlling board. . ." MCLA 38.71; MSA 15.1972. The Act, however, does not supply a definition for "employed" nor does the Act speak to how multiple employer situations should be treated for purpose of tenure acquisition. . . .
>
> We find the criteria used in the "economic reality" test to be the applicable standards for establishing the existence of an employment relationship within the meaning of the Teachers" Tenure Act. Thus, at hearing our inquiry, at a minimum, will focus, on: 1) the power to select and hire, 2) payment of wages, 3) the power to dismiss, 4) the power to control the manner of which the work is performed, 5) whose work is being done, and 6) whether the work being done is an integral part of the claimed employer's business. Further, we find that weight would be given to those factors which will most nearly serve the purpose of the Act. . . .[14]

The Commission applied its "economic reality" test in determining who was the employer in a federally funded program. Appellant (Imbrunone) had previously acquired tenure status in another Michigan district. She was employed as assistant director in a Magnet School project conducted jointly by the Inkster, Cherry Hill, and Westwood school districts. For the second year of her employment, she was appointed to the position of advisor. At the end of her second year, she was terminated due to a necessary reduction in personnel. Imbrunone alleged that she gained tenure both as a classroom teacher and as a teacher employed in a capacity other than a classroom teacher. She alleged that positions were available in each school district that she was certified and qualified to hold.

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[13] Loeffler v. Monroe Public Schs., TTC 84-25; Imbrunone v. Inkster Public Schs., Cherry Hill Sch. Dist., and Westwood Community Sch. Dist., TTC 81-52; Private Case, TTC 81-49.

[14] Private Case, TTC 81-49 at 8-9.

Cherry Hill and Westwood argued that Imbrunone was an employee of Inkster because that district was fiscal agent for the consortium. Inkster argued that the Magnet School Project was a separate entity, —the Magnet School Project—a "strawman," and that none of the districts was her employer.

When the Commission applied its "economic reality" test to Imbrunone's assignment, it found that: 1) the Magnet School Project was a consortium operated by all three districts, 2) the power to employ staff was shared jointly by the three districts, 3) all three districts were involved in soliciting funds and all three had to agree how the funds were to be expended, 4) all three districts shared the decision of discharging Imbrunone, 5) all three districts shared the responsibility for control of the manner in which work was performed, and 6) with respect to whose work was being done, the program served students from all three districts. The Commission concluded that Imbrunone held tenure status in all three districts.[15]

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[15] Imbrunone v. Inkster Public Schs., Cherry Hill Sch. Dist., and Westwood Community Sch. Dist., TTC 81-52. Since *Imbrunone*, school districts involved in joint ventures have been more careful in providing that only one of the districts is responsible for administration of the program thus avoiding multi-employer situations.

Court Decisions

Listed below are the decisions of the Michigan Supreme Court and the Michigan Court of Appeals wherein the Michigan Teacher Tenure Act was interpreted.

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Ajluni v. Bd. of Educ. of West Bloomfield School Dist., 397 Mich. 462, 245 N.W.2d 49 (1976), [reversing 59 Mich. App. 213, 229 N.W.2d 385 (1975)].

Amato v. Oxford Area Community School Dist. No. 7, 402 Mich. 521, 266 N.W.2d 445 (1978), [reversing 70 Mich. App. 305, 245 N.W.2d 728 (1976)].

Beebee v. Haslett Public Schools, (after remand to Tenure Commission) 406 Mich. 224, 278 N.W.2d 37 (1979), [reversing 66 Mich. App. 718, 239 N.W.2d 724 (1976)].

Benton Harbor School Dist. v. State Tenure Commission, 372 Mich. 270, 126 N.W.2d 102 (1964).

Bode v. Roseville School Dist. 405 Mich. 517, 275 N.W.2d 472 (1979), [affirming Mich. App. No. 24486 (198), unpublished opinion.

Boyce v. Royal Oak Bd. of Educ., 407 Mich. 312, 285 N.W.2d 196 (1979) [affirming 76 Mich. App. 526, 257 N.W.2d 153 (1977)].

Breuhan v. Plymouth-Canton Community Schools, ___ Mich.___ , ___ N.W.2d___ (1986).

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Detroit Bd. of Educ. v. Parks, 417 Mich. 268, 335 N.W.2d 641 (1983), [affirming in part, 98 Mich. App. 22, 296 N.W.2d 815 (1980)].

Detroit Fed. of Teachers v. Bd. of Educ. Detroit, 396 Mich. 220, 240 N.W.2d 255 (1972) [reversing 50 Mich. App. 660, 21, N.W.2d 839 (1973)].

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McFarlane v. East Detroit Bd. of Educ., 364 Mich. 103, 110 N.W.2d 808 (1961).

McKee v. Woodhaven School Dist., 416 Mich. 316, 330 N.W.2d 416 (1982), reversing 100 Mich. App. 195, 298 N.W.2d 881 (1980).

Munro v. Elk Rapids School, 383 Mich. 661, 178 N.W.2d 450 (1969), [reversed on rehearing, 385 Mich. 618, 189 N.W.2d 224 (1971).

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Pounder v. Harper Woods Bd. of Educ., 402 Mich. 91, 260 N.W.2d 187 (1977), [affirming in part and reversing in part, 72 Mich. App. 717, 250 N.W.2d 504 (1976)].

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Teachers' Tenure Act.
[Act 4, P.A. (Ex. Sess), 1937)]

AN ACT relative to continuing tenure of office of certificated teachers in public educational institutions; to provide for probationary periods; to regulate discharges or demotion; to provide for resignations and leaves of absence; to create a state tenure commission and to prescribe the powers and duties thereof; and to prescribe penalties for violation of the provisions of this act. Am. 1964, p. 8, Act 2, Eff. Aug. 28.

The People of the State of Michigan enact:

Article I.
DEFINITIONS.

MCL 38.71 DEFINITIONS; TEACHER.

Sec. 1. The term "teacher" as used in this act shall include all certificated persons employed for a full school year by any board of education or controlling board of any public educational institution. (MSA.15.1971.)

HISTORY: Am. 1967, p. 313, ACT 216; Imd. Eff. Jul. 10.

MCL 38.72 SAME; CERTIFICATED.

Sec. 2. The term "certificated" shall be as defined by the state board of education. (MSA 15.1972.)

HISTORY: Am. 1967. p. 313, ACT 216, Imd. Eff. Jul. 10.

MCL 38.73 SAME; CONTROLLING BOARD.

Sec. 3. The term "controlling board" shall include all boards having the care, management, or control over public school districts and public educational institutions. (MSA 15.1973.)

MCL 38.74 SAME; DEMOTE.

Sec. 4. The word "demote" shall mean to reduce compensation or to transfer to a position carrying a lower salary. (MSA 15.1974.)

MCL 38.75 SAME: SCHOOL YEAR.

Sec. 5. The "school year" shall be defined as the legal school year at the time and place where service was rendered. (MSA 15.1975.)

Article II
PROBATIONARY PERIOD

MCL 38.81 PROBATIONARY PERIOD; TEACHERS THAT HAVE SERVED ONE SYSTEM THE REQUIRED PERIOD ON EFFECTIVE DATE OF ACT; AUTHORITY OF CONTROLLING BOARD.

Sec. 1. All teachers during the first 2 school years of employment shall be deemed to be in a period of probation: Provided, That any teacher under contract at the time this act becomes effective who has previously rendered 2 or more years of service in the same school district shall be granted continuing tenure immediately upon reappointment by the controlling board:Any such controlling board by unanimous vote of its members, however, may refuse to appoint a teacher who has rendered 2 or more years service in the school district under its control. In the event the vote against reappointment of such teacher is not unanimous the controlling board shall deem such teacher as on continuing tenure with full right to hearing and appeal as provided in article 4 and article 6 of this act:Provided further, That the controlling board, after this act becomes effective, may place on continuing tenure any teacher who has previously rendered 2 or more years of service. (MSA 15.1981.)

MCL 38.82 SAME; NUMBER OF YEARS A TEACHER MAY BE REQUESTED TO SERVE; EXTENSION OF PERIOD.

Sec. 2. No teacher shall be required to serve more than 1 probationary period in any 1 school district or institution: Provided, That a third year of probation may be granted by the controlling board upon notice to the tenure commission. (MSA 15.1982.)

MCL 38.83 SAME; NOTICE AS TO SATISFACTORINESS OF SERVICES; FAILURE TO SUBMIT STATEMENT, EFFECT; NOTICE OF DISCONTINUANCE OF SERVICE.

Sec. 3. At least 60 days before the close of each school year the controlling board shall provide the probationary teacher with a definite written statement as to whether or not his work has been satisfactory. Failure to submit a written statement shall be considered as conclusive evidence that the teacher's work is satisfactory. Any probationary teacher or teacher not on continuing contract shall be employed for the ensuing year unless notified in writing at least 60 days before the close of the school year that his services will be discontinued. (MSA 15.1983.)

HISTORY: Am. 1976, p. 313, ACT 216, Imd. Eff. Jul. 10.

MCL 38.84 SAME; PORTIONS OF ACT INAPPLICABLE

Sec. 4. Articles 4, 5 and 6 shall not apply to any teacher deemed to be in a period of probation. (MSA 15.1984.)

HISTORY: Add. 1963, p. 422, Eff. Sep. 6.

Article III.

CONTINUING TENURE.

MCL 38.91 CONTINUING TENURE; IN ADMINISTRATIVE CAPACITY, CONTRACT EFFECT OF FAILURE TO REEMPLOY IN SUCH CAPACITY; EXTRA DUTY FOR EXTRA PAY.

Sec. 1. After the satisfactory completion of the probationary period, a teacher shall be employed continuously by the controlling board under which the probationary period has been completed, and shall not be dismissed or demoted except as specified in this act. If the controlling board shall provide in a contract of employment of any teacher employed other than as a classroom teacher, including but not limited to, a superintendent, assistant superintendent, principal, department head or director of curriculum, made with such teacher after the completion of the probationary period, that such teacher shall not be deemed to be granted continuing tenure in such capacity by virtue of such contract of employment, then such teacher shall not be granted tenure in such capacity, but shall be deemed to have been granted continuing tenure as an active classroom teacher in such school district. Upon the termination of any such contract of employment, if such controlling board shall not reemploy such teacher under contract in any such capacity, such teacher shall be continuously employed by such controlling board as an active classroom teacher. Failure of any controlling board to reemploy any such teacher in any such capacity upon the termination of any such contract of employment shall not be deemed to be a demotion within the provisions of this act. The salary in the position to which such teacher is assigned shall be the same as if he had been continuously employed in the newly assigned position. Failure of any such controlling board to so provide in any such contract of employment of any teacher in a capacity other than a classroom teacher shall be deemed to constitute the employment of such teacher on continuing contract in such capacity and subject to the provisions of this act. Continuing tenure shall not apply to an annual assignment of extra duty for extra pay. (MSA 15.1991.)

HISTORY: Am. 1941, p. 148, ACT 119, Imd. Eff. May 23; Am. 1963, p. 422, Act 242, Eff. Sep. 6.

MCL 38.92 SAME; EMPLOYMENT BY ANOTHER CONTROLLING BOARD; MAXIMUM PROBATIONARY PERIOD; OPTION OF BOARD; TIME FOR GIVING NOTICE.

Sec. 2. If a teacher on continuing tenure is employed by another board, he shall not be subject to another probationary period of more than 1 year beginning with the date of employment, and may at the option of the controlling board be placed immediately on continuing tenure. Any notice provided under section 3 of article 2 shall be given at least 60 days before the completion of the year of probation. If a teacher on continuing tenure becomes an employee of another controlling board as a result of school district reorganization, he shall be placed on continuing tenure within 30 days unless the controlling board, by a ⅔ vote on an individual basis, places the teacher on not more than 1 year probation. (MSA 15.1992.)

HISTORY: Am. 1967, p. 313, Act 216, Imd. Eff. Jul. 10.

Article IV.

DISCHARGE, DEMOTION OR RETIREMENT.

MCL 38.101 DISCHARGE OR DEMOTION OF TEACHER ON CONTINUING TENURE; RETIREMENT.

Sec. 1. Discharge or demotion of a teacher on continuing tenure may be made only for reasonable and just cause, and only after such charges, notice, hearing, and determination thereof, as are hereinafter provided. Nothing in this act shall be construed as preventing any controlling board from establishing a reasonable policy for retirement to apply equally to all teachers who are eligible for retirement under Act No. 136 of the Public Acts of 1945 or having established a reasonable retirement age policy, from temporarily continuing on criteria equally applied to all teachers the contract on a year-to-year basis of any teacher whom the controlling board might wish to retain beyond the established retirement age for the benefit of the school system. (MSA 15.2001.)

HISTORY: Am. 1941, p. 148, ACT 119, Imd. Eff. May 23; Amd. 1966, p. 30, Act 15, Imd. Eff. Apr. 6.

MCL 38.101 SAME; WRITTEN CHARGES; SIGNATURES; PROFESSIONAL SERVICES; FURNISHING OF STATEMENT; HEARING.

Sec. 2. All charges against a teacher shall be made in writing, signed by the person making the same, and filed with the secretary, clerk or other designated officer of the controlling board. Charges concerning the character of professional services shall be filed at least 60 days before the close of the school year. The controlling board, if it decides to proceed upon such charges, shall furnish the teacher with a written statement of the charges including a statement of the teacher's rights under this article, and shall, at the option of the teacher, provide for a hearing to take place not less than 30 nor more than 45 days after the filing of such charges. (MSA 15.2002.)

HISTORY: Am. 1967, p. 313, Act 216, Imd. Eff. Jul. 10.

MCL 38.103 SAME; SUSPENSION, COMPENSATION.

Sec. 3. On the filing of charges in accordance with this section, the controlling board may suspend the accused teacher from active performance of duty until a decision is rendered by the controlling board, but the teacher's salary shall continue during such suspension: Provided, That if the decision of the controlling board is appealed and the tenure commission reverses the decision of the controlling board, the teacher shall be entitled to all salary lost as a result of such suspension. (MSA 15.2003.)

MCL 38.104 SAME; HEARING, DECISION, POWERS OF BOARD

Sec. 4. The hearing shall be conducted in accordance with the following provisions:

a. The hearing shall be public or private at the option of the teacher affected.

b. No action shall be taken resulting in the demotion or dismissal of a teacher except by a majority vote of the members of the controlling board.

c. Both the teacher and the person filing charges may be represented by counsel.

d. Testimony at hearings shall be on other or affirmation.

e. The controlling board shall employ a stenographer who shall make a full record of the proceedings of such hearing and who shall, within 10 days after the conclusion thereof, furnish the controlling board and the teacher affected thereby with a copy of the transcript of such record, which shall be certified to be complete and correct.

f. Any hearing held for the dismissal or demotion of a teacher, as provided in this act, must be concluded by a decision in writing, within 15 days after the termination of the hearing. A copy of such decision shall be furnished the teacher affected within 5 days after the decision is rendered.

g. The controlling board shall have the power to subpoena witnesses and documentary evidence, and shall do so on its own motion or at the request of the teacher against whom charges have been made. If any person shall refuse to appear and testify in answer to any subpoena issued by the controlling board, such controlling board may petition the circuit court of the county setting forth the facts which court shall thereupon issue its subpoena commanding such person to appear before the controlling board there to testify as to the matters being inquired into.Any failure to obey such order of the court may be punished by such court as contempt thereof. (MSA 15.2004.)

MCL 38.105 NECESSARY REDUCTION IN PERSONNEL, REAPPOINTMENT, FIRST VACANCY

Sec. 5. Any teacher on permanent tenure whose services are terminated because of a necessary reduction in personnel shall be appointed to the first vacancy in the school district for which he is certified and qualified. (MSA 15.2005.)

Article V.
RESIGNATION AND LEAVE OF ABSENCE.

MCL 38.111 RESIGNATION AND LEAVE OF ABSENCE; TEACHER'S DUTIES, NOTICE.

Sec. 1. No teacher on continuing tenure shall discontinue his services with any controlling board except by mutual consent, without giving a written notice to said controlling board at least 60 days before September first of the ensuing school year. Any teacher discontinuing his services in any other manner than as provided in this section shall forfeit his rights to continuing tenure previously acquired under this act. (MSA 15.2011.)

MCL 38.112 LEAVE OF ABSENCE; REQUEST; AUTHORITY OF BOARD TO GRANT WITHOUT REQUEST; HEARING RELATIVE TO PHYSICAL OR MENTAL DISABILITY.

Sec. 2. Any controlling board upon written request of a teacher may grant leave of absence for a period not to exceed 1 year, subject to renewal at the will of the board: Provided, That without request, leave of absence because of physical or mental disability may be granted by any controlling board for a period not to exceed 1 year: Provided further, That any teacher so placed on leave of absence shall have the right to a hearing on such unrequested leave of absence in accordance with the provisions for a hearing in article 4, section 4 of this act: Provided, That no leave of absence shall serve to terminate continuing tenure previously acquired under this act. (MSA 15.2012.)

Article VI
RIGHT TO APPEAL

MCL 38.121 APPEAL; HEARING, NOTICE.

Sec. 1. A teacher who has achieved tenure status may appeal any decision of a controlling board under this act within 30 days from the date of such decision, to a state tenure commission.The state tenure commission shall provide for a hearing to be held within 60 days from the date of appeal. Notice and conduct of such hearing shall be the same as provided in article 4, section 4 of this act, and in such other rules and regulations as the tenure commission may adopt. (MSA 15.2021.)

HISTORY: Am. 1963, p. 422, Act 242, Eff. Sep. 6.

Article VII
STATE TENURE COMMISSION

MCL 38.131 STATE TENURE COMMISSION; CREATION, MEMBERS, EX-OFFICIO SECRETARY; LEGAL ADVISOR.

Sec. 1. There is hereby created a state tenure commission of 5 members: 2 of whom shall be classroom instructors, 1 a member of a board of education of a graded or city school district, 1 a person not a member of a board of education or a teacher , and 1 a superintendent of schools. The superintendent of public instruction shall be ex officio secretary of the commission, and the attorney general shall assign to the commission an assistant who shall be legal advisor to the commission. (MSA 15.2031.)

HISTORY: Am. 1963, p. 422, Act 242, Eff. Sep. 6.

MCL 38.132 SAME; TERMS, VACANCY.

Sec. 2. Within 30 days after the effective date of this act, the governor shall appoint the members of the tenure commission for the following terms: One for a term of 3 years, 1 for a term of 2 years and 1 for a term of 1 year. Each term shall begin on the first day of September. Immediately preceding the expiration of their respective terms the governor shall appoint succeeding members of the tenure commission for terms of 5 years. In the event of a vacancy on the tenure commission the governor shall immediately appoint a successor to complete the unexpired term. (MSA 15.2032.)

MCL 38.133 SAME; GEOGRAPHICAL QUALIFICATIONS OF MEMBERS

Sec. 3. Not more than 1 member of the tenure commission shall be appointed from any 1 school district. (MSA 15.2033.)

MCL 38.134 SAME; QUALIFICATION OF TEACHER MEMBER.

Sec. 4. Any teacher appointed to the tenure commission after September 1, 1938, must be on continuing tenure. (MSA 15.2034.)

MCL 38.135 SAME; TEACHER MEMBER'S STATUS WITH CONTROLLING BOARD.

Sec. 5. Membership on the state tenure commission shall not adversely affect the status of the teacher's tenure with a controlling board. (MSA 15.2035.)

MCL 38.136 SAME; MEETINGS.

Sec. 6. (1) The tenure commission shall meet twice a year at stated times in the city of Lansing, and at other times and in other places as determined by the commission.

(2) The business which the commission may perform shall be conducted in compliance with Act No. 267 of the Public Acts of 1976, being sections 15.261 to 15.275 of the Michigan Compiled Laws. Public notice of the time, date, and place of the meeting shall be given in the manner required by Act No. 267 of the Public Acts of 1976. (MSA 15.2036.)

MCL 38.137 SAME; POWER TO ENFORCE ACT.

Sec. 7. The tenure commission is hereby vested with such powers as are necessary to carry out and enforce the provisions of this act. (MSA 15.2037.)

MCL 38.138 SAME; COMPENSATION AND EXPENSES.

Sec. 8. The members of the state tenure commission shall receive 40 days @ $45.00 per day while hearing cases and shall be reimbursed for necessary traveling and other expenses incurred in the performance of the duties of the commission. The expenses of the state tenure commission shall be paid out of appropriations made by the legislature. (MSA 15.2038.)

HISTORY: Am. 1965, p. 10, Act 8, Imd. Eff. Apr. 8; Am. 1975, Act 56, Imd. Eff. May 20.

MCL 38.139 SAME; DUTY TO ACT AS BOARD OF REVIEW; RECORDS.

Sec. 9. (1) The tenure commission shall act as a board of review for all cases appealed from the decision of a controlling board. All records shall be kept in the office of the superintendent of public instruction.

(2) A writing prepared, owned, used in the possession of, or retained by the commission in the performance of an official function shall be made available to the public in compliance with Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws. (MSA 15.2039.)

HISTORY: Am. 1963, p. 423, Act 242, Eff. Sep. 6; Am. 1977, Act 252, Imd. Eff. Dec. 12.

MCL 38.140 SAME; FIRST MEETING, ELECTION OF CHAIRMAN AND SECRETARY, RULES AND REGULATIONS.

Sec. 10. Within 30 days after the effective date of this act, the tenure commission shall hold a meeting in the city of Lansing for the purpose of organization and the election of a chairman and secretary, both of whom shall be members of the commission. The tenure commission shall draw up rules and regulations and shall have the power to amend same and to provide for the conduct of its affairs in such manner as shall be consistent with the provisions of this act. (MSA 15.2040.)

MCL 38.141 (REPEALED.P.A. 1965, NO. 8, SEC. 2, Imd. Eff. April 8. THIS SECTION PROVIDED TWO-YEAR APPROPRIATION FOR EXPENSES OF THE TENURE COMMISSION.) (MSA 15.2041.)

Article VIII.

DISTRICTS.

MCL 38.151 TEACHER TENURE ACT, APPLICATION.

Sec. 1. This act shall apply to all school districts of the state. (MSA 15.2051(1).)

HISTORY: Am. 1964, p. 8, Act 2, Eff. Aug. 28.

MCL 38.152 (REPEALED BY PUB ACTS 1964, NO. 2 EFF AUGUST 28. SECTION PROVIDED THAT SCHOOL DISTRICT BOARD SHALL NOTIFY THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE RESULTS OF THE ELECTION.)(MSA 15.2051(1).)

Article IX.

PENALTY

MCL 38.161 VIOLATION OF ACT; PENALTY.

Sec. 1. Failure of any member of a controlling board to comply with any provisions of this act shall be deemed a violation of the law and shall subject said member to the same penalty as prescribed for a violation of the general school law. (MSA 15.2052.)

Article X.
INCONSISTENT ACTS.

MCL 38.171 (REPEALED BY PUB ACTS 1947, NO 129, EFF OCTOBER 11. THIS WAS A REPEAL SECTION.) (MSA 15.2053.)

MCL 38.172 TEACHERS; WAIVER OF RIGHTS IN CONTRACTS PROHIBITED.

Sec. 2. No teacher may waive any rights and privileges under this act in any contract or agreement made with a controlling board. In the event that any section or sections of a contract or agreement entered into between a teacher and a controlling board make continuance of employment of such teacher contingent upon certain conditions which may be interpreted as contrary to the reasonable and just causes for dismissals, provided by this act, such section or sections of a contract or agreement shall be invalid and of no effect in relation to the determination of continuance of employment of such teacher. (MSA 15.2054.)

Article XI.
SEVERING CLAUSE.

MCL 38.181 (REPEALED BY PUB ACTS 1945, NO. 267, IMD EFF MAY 25. THIS WAS A SEVERING CLAUSE SECTION.) (MSA 15.2055.)

Article XII.
EFFECTIVE DATE.

MCL 38.191 EFFECTIVE DATE.

Sec. 1. This act shall take effect and be in force from and after September first, 1937. (MSA 15.2056.)

State Tenure Commission General Rules

Effective February 3, 1976.
(By authority conferred on the state tenure commission by section 10 article 7 of Act No. 4 of the Public Acts of the Extra Session of 1937, as amended, being Sec. 38.140 of the Michigan Compiled Laws)

Part 1.
GENERAL PROVISIONS

R 38.131. DEFINITIONS

Rule 1. (1)"Act" means Act No. 4 of the Public Acts of the Extra Session of 1937, as amended, being Sec. 38.71 et seq. of the Michigan Compiled Laws.

(2) "Commission" means the state tenure commission created by the act.

(3) The terms defined in the act have the same meaning when used in these rules.

R 38.132. MEETINGS OF THE COMMISSION.

Rule 2. The chairperson of the commission or a majority of its members may call a session of the commission. The hours of the commission when in session shall be from 9 a.m. to 12 noon and 1:30 p.m. to 5 p.m. except as other wise ordered by the commission.

R 38.133. OFFICE OF THE COMMISSION.

Rule 3. The office of the commission shall be in the office of the state superintendent of public instruction.

R 38.139. RECISSION.

Rule 9. The rules of practice and procedure of the commission, being R. 38.71 and 38.101 to 38.123 of the Michigan Administrative Code and appearing on pages 342 to 345 of the 1957 Annual Supplement to the Code, pages 3542 and 3543 of the 1966 Annual Supplement to the Code and page 5354 of the 1970-71 Annual Supplement to the Code, are rescinded.

Part 2.
APPEAL PROCEDURES

R 38.141. REPRESENTATION; APPEARANCES.

Rule 38.141.(1) Practice before the commission shall be limited to attorneys at law in good standing. However, any party may represent himself.

(2) An attorney representing litigants under the act. or a party representing himself, shall file a written appearance on or before the time of the filing of the petition or the answer, whichever shall be applicable, at the office of the commission. Substitution of a withdrawing attorney shall be made upon written stipulation of the withdrawing attorney and the party represented, or at the discretion of the commission. The stipulation shall be filed immediately with the commission.

R 38.142 FORM AND STYLE OF PAPERS

Rule 12. Papers filed with the commission shall be printed or typewritten and, if typewritten, shall be on 1 side only of white bond paper not more than 8½ inches wide and 13 inches long. Pleadings and briefs shall be filed with the commission along with 6 copies duly signed by the attorney, appealing party or controlling board member. The commission may waive filing of the extra copies.A single copy of exhibits and transcript shall be filed unless the commission requests additional copies. The proper caption and docket number shall be placed on all papers filed along with 1 signed copy. The given name and surname of the party shall be set forth in the caption.

R 38.143. INITIATIO[OF APPEAL.

Rule 13. An appeal from a decision of a controlling board under the act shall be initiated within 30 days from the date of receipt of such decision by the appealing party or the attorney of the appealing party by filing a notice of appeal and petition, original and 6 copies, with the commission substantially in the following forms:

Notice of appeal.

STATE OF MICHIGAN
STATE TENURE COMMISSION

____
(Appellant)

vs. Docket No.

____
(Appellee)

NOTICE OF APPEAL

TO THE ABOVE NAMED APPELLEE(S):________________________
(BOARD OF EDUCATION)

YOU ARE HEREBY NOTIFIED that a petition has been filed with the State Tenure Commission in the above matter, and that if you desire to defend the same, you are required to answer or take such other action as may be permitted by law with regard to the petition herewith served upon you within 20 days after service of this notice of appeal and petition, exclusive of the day of service.If you fail to do so, judgment by default may be taken against you for the relief demanded in the petition.

(A copy of the Michigan Teachers' Tenure Act and the rules of the State Tenure Commission governing the practice and precedur[pertaining to proceedings before the State Tenure Commission may be obtained from the office of the Commission.)

DATED:____________________ ________________________
By order of the State Tenure
Commission

____
(Appealing party, or attorney)

____
(Business address)

Petition.

STATE OF MICHIGAN
STATE TENURE COMMISSION

____
Appellant

____
Appellee

PETITION

____________________, the above named Appellant, (by his attorney), hereby petitions for a hearing and appeals the decision of Appellee, as a basis alleges as follows:

I
FACTS

(Set forth by statement of the facts without repetition upon which cause of action the petitioner relies for specific averments as are necessary to inform reasonably the adverse party of the nature of the cause the adverse party is called upon to defend. Each allegation shall be clear, concise, and direct and set forth in a separate numbered paragraph.)

II
ASSIGNMENTS OF ERROR

(Set forth each assignment of error with such specific averments as are necessary to inform reasonably the adverse party of the nature of the claim asserted. Each assignment shall be clear, concise, and direct and stated in a separate numbered paragraph. Alleged error to be raised on appeal based upon a rule of the controlling board in the transcript of the local hearing must contain the citation of the volume and page of the transcript.)

III
RELIEF

(Set forth clearly and concisely those demands for relief to which petitioner deems himself or herself entitled. Relief in the alternative may be demanded.)

____
(Appealing party, or attorney)

R 38.144. FILING AND SERVICE OF NOTICE OF APPEAL AND PETITION.

Rule 14. An appeal is commenced by filing with the commission a notice of appeal, petition and transcript, if any. The petitioner shall serve the appellee forthwith in person or by registered mail with a copy of the notice of appeal petition.

R 38.145. FILING.

Rule 15. The filing of a document under these rules shall be with the office of the commission, and shall be received by the commission before the close of business on the last day of the time limit, if any, for the filing.

R 38.146. SERVICE.

Rule 16. Except for the original service of the notice of appeal and petition, service required or permitted to be made upon a party represented by an attorney shall be made as follows:

(a) Service upon the attorney shall be made by delivering or by mailing a copy to the attorney's last known business address. Service upon a party shall be made by delivering a copy or by mailing a copy to the party at the address as stated in the petition.

(b) Mailing of a copy within this rule means enclosing it in a sealed envelope with first class mail postage fully prepaid, addressed to the person to be served, and depositi[the envelope and its contents in the United States government mail.

(c) Proof of service of papers required or permitted to be served may be written acknowledgment of service, by affidavit of the person making service, or by other proof satisfactory to the commission.

R 38.147. ANSWERS

Rule 17. After service of a copy of a notice of appeal and petition, appellee shall have 20 days within which to file and serve an answer thereto. The answer shall contain specific admission or denial of each material allegation of fact contained in the petition and a statement of fact upon which the appellee relies for defense, and shall contain any affirmative allegations to be relied on by appellee. Each paragraph contained in the answer shall be numbered to correspond with the paragraphs in the petition.An original and 6 copies of the answer shall be filed with the commission and a copy shall be served upon all other parties.

R 38.148. AMENDMENTS.

Rule 18. The commission, or its chairperson, may permit a party to amend his pleadings before, during, or after the conclusion of the hearing upon such terms as may be deemed just and consistent with due process.

R 38.149. JOINDER OF PETITIONS.

Rule 19. More than 1 petitioner may join in appeal with assertion of a right to relief jointly, severally or in the alternative in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences, and if any question of law or fact common to all of them will arise in the action, or if it appears that their presence in the action will promote the convenient administration of justice. Misjoinder of petitioners is not ground for dismissal of the petition. Petitioners may be added or dropped by order of the commission on motion of any party or of its own initiative at any stage of the action and on such terms as are just.

Part 3.

MOTION PRACTICE.

R 38.151. FORM, TIME FOR FILING.

Rule 21. (1) An application to the commission for an order in a pending action shall be by motion, in writing, unless made during a hearing. It shall state with particularity the grounds therefore, and shall set forth the relief of order sought.

(2) A written motion, a brief, and notice of the hearing thereof shall be served upon the opposing party before it is filed with the commission, unless a different time is fixed with good cause shown. Authorization by the chairperson of the commission for a different time shall be noted on the face of the notice.The day of hearing shall be not earlier than 14 days after the date of notice is served except by authorization of the chairperson of the commission. When a motion is supported by affidavit, the affidavit shall be served with the motion.Opposing affidavits may be served not later than 7 days before the hearing unless the commission permits them to be served at some other time, as provided in rule 29.

(3) Motions and responses thereto shall be accompanied by a brief which shall contain a concise statement of reasons in support of, or in opposition of, and a citation of authorities upon which the parties rely.

(4) A respondent opposing a motion shall file his response, including brief, if any, and supporting affidavits, within 10 days after service of the motions or at such other time as permitted by the commission or its chairperson.

(5) The movant and respondent shall serve copies of their respective papers upon opposing parties before or concurrently with the filing with the commission, and the papers shall indicate the service.

R 38.152. MOTION FOR A MORE DEFINITE STATEMENT.

Rule 22. If a petition or answer is so vague or ambiguous that it fails to comply with these rules, the opposing party may move for a more definite statement before filing responsive pleadings. The motion shall point out the defects complained and the details desired.

R 38.153. MOTION TO STRIKE.

Rule 23. Upon motion made by a party or upon the commission's own initiative, the commission may order striken from pleadings redundant, immaterial, impertinent, scandalous or indecent matter, or any part thereof not drawn in conformity with these rules, or evidence objected to which would not be admitted by the commission.

R 38.154. MOTION FOR ACCELERATED JUDGMENT.

Rule 24. Upon motion, a party may demand that an appeal be denied for 1 or more claims and a petition dismissed on the basis that the commission lacks jurisdiction of the subject matter, or that the appeal is barred because it is untimely or because of some other disability of the petitioner or other disposition of the claim, before commencement of the appeal. The commission may order an immediate hearing on disputed questions of fact and render a judgment forthwith if the proofs show the moving party is so entitled, or it may postpone the hearing until the merits are heard.

R 38.155 MOTION FOR SUMMARY JUDGMENT.

Rule 25. (1) A party seeking to recover upon a claim, or against whom a claim is asserted, may move, with or without supporting affidavits, for summary judgment in his favor on all or any part of the claim at any time. The motion shall state that the moving party is entitled to judgment in his favor because of any of the following:

(a) The petitioner has failed to state a claim upon which relief can be granted.

(b) The controlling board has failed to state a valid defense to the claim asserted against it.

(c) There is no genuine issue as to a material fact, except as to the relief to be granted, and the moving party is therefore entitled to judgment as a matter of law.

(2) A motion based upon subdivision (c) shall be supported by affidavits, and the opposing party may serve opposing affidavits. The affidavits, together with the pleadings, admissions, and documentary evidence then filed in the action or submitted by the parties, shall be considered by the commission at the hearing. Judgment shall be rendered forthwith if the pleadings show that a party is entitled to judgment as a matter of law or if the affidavits or other proof show that there is no genuine issue of fact.If it appears that the opposing party, rather than the moving party, is entitled to judgment, the commission may render summary judgment in his favor without the necessity of a motion therefor.

R 38.156. MOTION FOR ADJOURNMENT OR CONTINUANCE.

Rule 26. Adjournment or continuance shall not be granted except for good cause shown to the chairperson or designated member of the commission.

R 38. 157. MOTION FOR DEFAULT JUDGMENT.

Rule 27. A petitioner may move for judgment by default if the appellee has failed to file and serve an answer in accordance with these rules and that fact is made to appear by affidavit. If, to enable the commission to enter a judgment or to carry it into effect, it is necessary to take testimony concerning lost salary, to establish the truth of an allegation by evidence or to make investigation of any other matter, the commission may conduct hearings as it deems necessary and proper. For good cause shown, the commission may set aside a default judgment if application to have it set aside is made before the entry of the judgment or within 1 month after the judgment was served upon the party defaulted. A proceeding to set aside a default judgment, except when grounded on want of jurisdiction of the matter, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed with the commission.

R 38.158. MOTION FOR REHEARING.

Rule 28. A motion for rehearing may be filed within 60 days after the date of a decision. It shall state briefly and distinctly the grounds therefore.

R 38.159. HEARING OF MOTIONS.

Rule 29. When the motion is filed, the moving party shall request a date for a motion to be heard prior to or at the time of the pre-hearing conference. At the discretion of the commission and for just cause, a motion may be heard at any time. If no response, including a brief, to the motion is timely filed, the motion shall be considered and decided without a hearing unless otherwise ordered by the commission. The commission may dispense with or limit oral arguments on motions.

Part 4.

PRE-HEARING CONFERENCE.

R 38.161. SCOPE OF CONFERENCE.

Rule 31. In every matter, the commission shall direct the parties and their attorneys to appear for a pre-hearing conference:

(a) State and simplify the factual and legal issues involved and consider the amendment of pleadings.

(b) Consider motions to be disposed of before hearing, the consolidation of the case with another, admissions of fact and authenticity of documents to avoid unnecessary proofs, and limiting the number of witnesses and nature and extent of the relief demanded.

(c) Produce all proposed documentary evidence and admit their authenticity whenever possible.

(d) Prepare a list of witnesses who may be called at the time of the hearing.

(e) Estimate the time for hearing.

(f) Discuss the possibility of settlement.

(g) Consider all other matters that may aid in the disposition of the subject of disagreement.

R 38.162. PRE-HEARING SUMMARY.

Rule 33. The commission at the time of the pre-hearing conference may direct the parties to furnish the commission with a hearing brief as to any of the issues involved in the action. If required, hearing briefs are to be submitted to the commission at least 10 days before the hearing unless a different date is set by the commission, or unless the commission specifically waives the requirement.

R 38.164. PRESENCE OF PARTIES.

Rule 34. The commission may direct the parties to the action to be present or immediately available at the time of the pre-hearing conference.

R 38.165. WAIVER OF PRE-HEARING CONFERENCE.

Rule 35. The provisions of these rules pertaining to the pre-hearing conference and pre-hearing summary may be waived by stipulation of counsel of all parties to the action subject to the approval of the commission.

Part 5.
HEARINGS.

R 38.171. NOTICE OF HEARING.

Rule 41. The commission shall notify all parties, including members of the commission, of the time and place of a hearing, either in person or by ordinary mail, at least 14 days prior thereto.

R 38.172. GENERAL PROVISIONS.

Rule 72. A hearing for the purpose of taking evidence upon a petition shall be conducted by the commission or a hearing officer designated and authorized by the commission. A party may appear at a hearing in person or by legal counsel and may call, examine, and cross-examine witnesses and introduce into the record documentary or other evidence.Stipulations of fact may be introduced in evidence at the hearing at the discretion of the presiding officer conducting the hearing. An objection to the conduct of the hearing, including an objection to the introduction of evidence, may be oral or written and accompanied by a short statement of the grounds therefor.In a contested case, the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable but the commission or its designated and authorized hearing officer conducting the hearing may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent people in the conduct of their affairs.Irrelevant, immaterial, or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law. Objections to offers of evidence may be made and shall be noted in the record. The commission may take official notice of judicial cognizable facts, and may take notice of general, technical, or scientific facts within the commission's specialized knowledge.

R 38.173. SUBPOENAS.

Rule 43. (1) At the request of a party, subpoenas for attendance at a hearing shall be issued by the chairperson of the commission. A subpoena may command the person to whom it is directed to produce books, papers, documents, or other tangible things designated therein; but the commission, upon motion made at or before the time specified in the subpoena for compliance therewith, may quash or modify the subpoena if it is unreasonable or oppressive.

(2) Every subpoena shall be issued by the chairperson of the commission, shall state the title of the matter, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The chairperson shall issue a subpoena signed, but otherwise in blank, to a party requesting it who shall fill it in before service.

(3) A subpoena shall be served by leaving it personally with the person to whom it is directed. The commission may allow service of a subpoena to be made upon a person in any other manner which is reasonably calculated to give him actual notice of the subpoena, if the chairperson of the commission has authorized the service before it is made, upon a showing to the chairperson that service of the subpoena cannot reasonable be made in person.

(4) Witnesses subpoenaed before the commission shall be paid the same fees and mileage that are paid witnesses in circuit courts. Witness fees and mileage shall be paid by the party at whose instance the witnesses appear but may be recovered by the appealing body as costs if the commission so directs.

R 38.174. DEPOSITIONS.

Rule 44. The chairperson of the commission, upon the request of a party, may permit the taking of depositions or the serving of interrogatories for the purpose of discovery or testimony if the ends of justice would be served. A deposition shall be taken in accordance with the procedural requirements for the taking of depositions set forth in the Michigan general court rules.

R 38.175 BRIEFS.

Rule 45. A party is entitled, upon request made before the close of the hearing, to file a brief with the commission which may fix a reasonable time for the filing. The commission may direct the filing of briefs if in its opinion the filing is warranted by the nature of the proceedings or the particular issues involved. The commission shall designate the manner of filing and serving and the time therefor.

R 38.176. PROPOSED FINDINGS OF FACT AND DECISION.

Rule 46. A party is entitled, upon request made before the close of the hearing, to file proposed findings of fact, or a proposed decision, or both, with the commission which may fix a reasonable time for the filing. The commission may direct the filing of proposed findings of fact, or a proposed decision, or both, when in the opinion of the commission the filing is warranted by the nature of the proceedings or the particular issues involved. The commission may designate the manner of filing and serving and the time therefor.

R 38.177. DECISION OR ORDER.

Rule 47. (1) A decision or order of the commission shall be effective only if voted upon by a majority of the members of the commission, however, during the course of the hearing, the rulings of the chairperson of the commission are final.

(2) A decision or order of the commission shall be served in writing to the parties concerned, or to their attorneys if represented, by registered mail.

R 38.178. POWERS OF CHAIRPERSON OF THE COMMISSION.

Rule 48. The chairperson of the commission shall have the power to:

(a) Hold pre-hearing conferences.

(b) Dispose of procedural requests or similar matters.

(c) Continue or adjourn a hearing.

(d) Allow depositions to be taken.

(e) Issue subpoenas in the name of the commission.

(f) Conduct the hearing and take any other action which he is authorized to take under these rules.

(g) Designate a member of the commission to act as his delegate and exercise any of his powers whenever he is unable to act and circumstances require immediate action to be taken.

Definition of "certificated" as used in the Tenure Act.*

(By authority of art. 1 par. 2 Act No. 4. Public Acts of 1937 [ex. Ses.] [CL 1948, Sec. 38.71 et seq.].)

R 390.661. CERTIFICATION OF TEACHERS UNDER TEACHERS' TENURE ACT.

a. For the purposes of teacher tenure under the provisions of article 1, Act No. 4, Public Acts of 1937, Extra Session, "certificated" as it refers to teachers shall include any teacher holding a Michigan certificate which is valid for the position to which he is assigned, but shall not include nondegree persons holding special certificates as teachers or teacher aides in training in experimental programs.

b. For the purposes of article 3, Act No. 4, Public Acts of 1937, Extra Session, "certificated" shall include any teacher who holds a junior (community college) permanent certificate, an elementary or secondary permanent certificate, or an elementary or secondary provisional certificate. It shall also include any teacher who holds both a bachelor's degree and a life certificate. In the event that a nondegree life certificated teacher is employed in a school district which has adopted tenure on or after July 1, 1958, or whose services have been acquired by a tenure district through school district reorganization or annexation, the teacher shall be considered certificated under the provisions of article 3, Act No. 4, Public Acts of 1937, Extra Session, if he annually completes 6 semester hours of additional credit applying on requirements for a bachelor's degree: Provided that the state board of education may make exceptions to this requirement in hardship cases. It shall also include any teacher who holds a degree but is serving on a special certificate because of other deficiencies toward a provisional certificate, providing that he annually completes 6 semester hours of additional credit applying toward such deficinencies. It shall also include any nondegree teacher serving on a special certificate because of deficiencies toward a provisional certificate providing that he completes annually 6 semester hours of additional credit applying toward such deficiencies, but shall not include nondegree persons holding special certificates as teachers or teacher aides in training in experimental programs.

HISTORY: 1954 ACS 6, p. 16; 1954 ACS 25, p. 36; 1954 ACS 27, p. 9; 1954 ACS 40, p. 25.

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*Section 38.72 of the Michigan Teachers' Tenure Act gives the authority to the State Board of Education to define the term "certificated" as used in the Act.